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LEGAL SECRETARIAT LIBRARY

CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

HANFSTAENGL *v.* EMPIRE PALACE.

C. A.
1894
Feb 21.

[1894 H. 543.]

Copyright in Paintings—Fine Arts Copyright Act, 1862 (25 & 26 *Vict. c.* 68)—*Tableaux Vivants.*

Held, by the Court of Appeal, affirming the decision of *Stirling,* J., that the representation of a picture by a *tableau vivant,* formed by grouping in the same way as the figures in the picture living persons dressed in the same way and placed in the same attitudes as the figures in the picture, is not an infringement of copyright in the picture.

THIS was an action by the owner of certain pictures, who was also entitled to the copyright in the designs, to restrain the exhibition of them as *tableaux vivants.*

The exhibition complained of took place at the *Empire Theatre.* There was a special programme of the "New Series of Living Pictures," five of them, namely, those numbered 1, 4, 5, 10 and 11, being representations of pictures belonging to Plaintiff. The representations were exact reproductions as *tableaux vivants* of the pictures, and the backgrounds were painted on canvas, the whole being enclosed in a large gilt frame.

The backgrounds were copies made, not directly from the pictures, but from photographs of them, which had been purchased.

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A notice of the exhibition appeared in the *Daily Graphic*, accompanied by small engravings of the different scenes exhibited. The action was brought against the *Empire Palace, Limited*, which exhibited the *tableaux*, and against the proprietor and the publisher of the *Daily Graphic*, and claimed to restrain the *Empire Palace* from exhibiting or representing as part of their series of "Living Pictures" any copies or imitations of the Plaintiff's five copyright works therein mentioned, or any of them, or advertising the exhibition or representation of copies or imitations of the said works or any of them, or including the same in their programmes, and to restrain all the Defendants from making or permitting to be made any copies or colourable imitations of the said works or any of them as illustrations in the *Daily Graphic*, or otherwise, and from printing, publishing, or selling or offering for sale, or otherwise disposing of, or causing, or permitting to be printed, published, sold, offered for sale, or otherwise disposed of any of such copies or colourable imitations—the delivery up of blocks and copies—an account of profits—damages, and penalties pursuant to 25 & 26 Vict. c. 68.

The Plaintiff gave notice of motion for injunction in the terms of the writ against the *Empire Palace*, and the proprietor and publisher of the *Daily Graphic*. The motion came on before Mr. Justice *Stirling*, and was argued on the ground that the groups of living persons were a reproduction of the design of the pictures within the meaning of the Act. Mr. Justice *Stirling* was of opinion that the representation of the designs of the pictures by means of groups of living persons was not any infringement of the rights of the Plaintiff. And the *Empire Palace* undertaking to keep until the trial the backgrounds to the five "Living Pictures," the subject of this action, or to take and keep photographs of the backgrounds used in respect of such five pictures, and to keep an account of the moneys received at all exhibitions at which any such backgrounds were exhibited, and the number of times each such background was exhibited, no order was made against the *Empire Palace*. The motion as against the proprietor and publisher of the *Daily Graphic* was ordered to stand over.

The Plaintiff gave notice of appeal to the *Empire Palace*.

Hastings, Q.C., *T. E. Scrutton*, and *A. H. Jessel*, for the appeal:—

We contend that the Defendants infringe the Plaintiff's rights under 25 & 26 Vict. c. 68, s. 1, which gives the owner of the copyright in paintings the sole and exclusive right of reproducing the paintings or the design of them by any means and of any size. The intention of the Legislature was to forbid reproduction in any way. The Judge below thought that the reproduction must be something permanent, but the statute does not say anything about its being permanent or temporary.

[KAY, L.J.:—Sect. 6 seems to imply that the reproduction must be by something which is capable of being forfeited.]

That provision directs forfeiture where copies are made which are capable of forfeiture, but the generality of sect. 1 cannot be limited because in some cases there may be reproductions of such a kind as not to be capable of forfeiture. In *Ex parte Beal* (1), it was decided that it makes no difference whether the copy complained of is a copy made from an original, or from a copy of it, and the same case decides that the statute does not refer only to imitation of a painting by a painting, of a drawing by a drawing, and of a photograph by a photograph. In *Dicks* v. *Brooks* (2), it was held that the work complained of was no infringement of the rights of the proprietor of the engraving, but the observations of the Judges tend to the conclusion that the result of the proceeding would have been different if the Plaintiff had been the proprietor of the design as well as of the engraving. By sect. 1, the owner of the copyright has the sole right to "copy, reproduce or multiply" the painting or its design. Such a reproduction as this comes within the definition of "copy" given by *Bayley*, J., in *West* v. *Francis* (3). "A copy is that which comes so near to the original as to give every person seeing it the idea created by the original."

[KAY, L.J.:—*Bayley*, J., was only considering what degree of likeness there must be for one print to be considered a copy of another.]

(1) Law Rep. 3 Q. B. 387, 393. (2) 15 Ch. D. 22.
(3) 5 B. & Al. 737, 743.

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"Picture" may be taken to mean a representation of an actual scene without action.

[KAY, L.J.:—That definition would include sculpture.]

A copy does not lose the character of a copy by not being of the same nature or character as the original, or by not being made in the usual way or by being made by a process not known when the Acts were passed: *Turner* v. *Robinson* (1); *Gambart* v. *Ball* (2); *Graves* v. *Ashford* (3). [*Lucas* v. *Cooke* (4) was also referred to.]

Buckley, Q.C., and *Roger Wallace*, for the *Empire Palace*, were not called upon.

H. A. Forman watched the case for the *Daily Graphic*.

LINDLEY, L.J.:—

This is no doubt a new and an important question, but I cannot help thinking that we are asked to put upon the *Copyright Act* a construction which was never dreamt of when it was passed, and which it does not really bear. We are asked to say that a person who is an author of a painting or a drawing or a photograph, is entitled to restrain other people from representing it by living pictures. Whether it is called dramatising or not and whether there is action in it or not, I do not think is material.

The Plaintiff bases his right upon the *Copyright Act* (25 & 26 Vict. c. 68). He is a foreigner, but that is immaterial. Under the *International Copyright Act*, he may for this purpose be treated as if he were a British subject, and the author of some original painting, drawing or photograph. We need not go into the process by which he has attained that position, for it is conceded that that is his position. The Act (25 & 26 Vict. c. 68) is one of a series. There is a *Literary Copyright Act*, there is an *Engraving Copyright Act*, there is a *Painting Copyright Act*, there is a *Designs Copyright Act*, there is a *Dramatic Copyright Act*, and a *Sculpture Copyright Act*. This is an Act passed in order to

(1) 10 Ir. Ch. Rep. 121, 510.
(2) 14 C. B. (N.S.) 306.
(3) Law Rep. 2 C. P. 410.
(4) 13 Ch. D. 872, 879.

place authors of paintings, drawings and photographs in a position more or less similar to that of engravers. As early as 1735 there was an Act of Parliament, 8 Geo. 2, c. 13, protecting engravers and giving them a copyright in their engravings, and that Act was followed by 7 Geo. 3, c. 38, and 17 Geo. 3, c. 57, which again were confined to engravers. Painters were left out, and naturally complained that there was no *Copyright Act* for them. This Act (25 & 26 Vict. c. 68) was passed to assist them and to give them a commercial copyright in their paintings. It was not confined to paintings; it was extended to drawings and photographs, and its object was to protect the authors of paintings, drawings and photographs from persons who would copy their paintings, drawings or photographs in any way then known, or in any new way of copying which might be invented. But Parliament, in endeavouring to protect them, was not intending to lay a totally different class of people under restraint; it was not dealing with or intending to limit the scope of a sculptor's business, or of an actor's business. It was to protect painters and persons who produced drawings and photographs from having the commercial value of their productions impaired by the reproduction by any means of something of a character similar to that of which they were the authors. That is the key to this Act. The language of sect. 1 of 25 & 26 Vict. c. 68 (reading it shortly) is this: "The author of every original painting, drawing, and photograph shall have the sole and exclusive right of copying, engraving, reproducing and multiplying such painting or drawing, and the design thereof, or such photograph and the negative thereof, by any means and of any size, for the term of the natural life of such author, and seven years after his death." Now what does that mean? We are asked to say that the words "copying and reproducing by any means" include reproducing in the sense of imitating or representing by means not equivalent to drawing or painting or photographing or any such means, but by totally different means, by the exhibition of living figures. Is that what is aimed at? It appears to me that obviously and plainly it is not. When we look at the language used where an idea of that kind was present to the mind of the Legislature, we find a totally

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different class of words selected. The word "represent" is the word used in the *Dramatic Copyright Act* (3 & 4 Will. 4, c. 15), but there is not a word about "representing" in the Act with which we are dealing. It does not say that the author of a picture shall be entitled to prevent anybody from representing his picture. It is intended to protect the author of the picture from anybody's producing a painting, drawing or photograph of his picture so as to compete with him in the market. The language appears to me to be incapable of being stretched so as to touch such a representation as is sought to be restrained in this case.

Light is thrown upon the true construction of sect. 1 by sect. 6 which provides for the forfeiture, and sect. 10 which prohibits the importation, of copies unlawfully made. Those sections are not applicable to this Act if it is construed as the Plaintiff asks us to construe it. But I do not rely so much upon those sections as upon the clear and what I consider the unquestionable meaning and intention of Parliament in passing this series of Acts. If we are to go out of the language and look further, I think a good deal of light is thrown upon this question by the case of *Dicks* v. *Brooks* (1), because although it is very true, as was pressed upon us by Mr. *Scrutton*, that the word "design" is not used in the *Engraving Acts*, still the object of the Acts in protecting engravings is exactly the same as the object which the Legislature had in view in protecting paintings, drawings, and photographs in this Act. It was not meant to give them the right to restrain Madame *Tussaud* from exhibiting a representation of a painting in waxwork; but to restrain people from producing something which would compete in the market with the originals or with authorized copies of them. The appeal will be dismissed with costs.

KAY, L.J.:—

I am entirely of the same opinion.

The Plaintiff in this case I understand has all the rights of the author of the paintings which he says have been reproduced, and therefore he has the right to protect the painting, and the

(1) 15 Ch. D. 22.

design thereof. As Lord Justice *Lindley* has said, he is brought within this statute which we have to consider, for although he is a foreigner and the paintings are foreign paintings, yet by reason of the *International Copyright Act* he may be treated as though he were a British subject, and the author of a painting produced in this country by a British subject.

Now what has actually been done is this. Upon the stage of the *Empire Theatre* a large gilt frame has been set up, and behind that frame and at some distance from it a painted canvas on which the background of the original picture has been copied. With this at present we have nothing to do, because an undertaking has been given which covers that part of the case, and the argument before us has not been rested upon the fact that certain portions of this so-called picture consisted of a painted canvas copied from the original background. The rest of the so-called picture consists of human figures grouped precisely, and dressed I presume precisely, like the figures in the pictures of which the Plaintiff is the owner. I assume that the grouping and dress was taken directly from the original pictures. The question is whether (putting the background out of sight for the moment), such a representation as this of a picture of which the Plaintiff is in the position of the author or artist, is a reproduction of the painting or of the design of the painting within the meaning of this Act. If it is, of course the right to an injunction is quite clear.

The words of the statute 25 & 26 Vict. c. 68, s. 1 (which I will read shortly, taking only the words applicable to the present case), are these: "The author of every original painting shall have the sole and exclusive right of copying, engraving, reproducing, and multiplying such painting, and the design thereof" (I think looking at sect. 6 it probably would be right to read that as though it were "or the design thereof") "by any means and of any size, for the term of the natural life of such author, and seven years after his death." Now is this which I have been shortly describing a reproduction of such painting? A reproduction of a painting must, one would think, be by another painting or something which is equivalent to another painting, and I do not think it has been argued that this is a reproduction of the painting. The argument has been rather put on the ground

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that this is a reproduction of "the design thereof" within the meaning of the Act. What does "reproduction" really mean? Reproduction is producing again. Is this a producing again the design of this painting within the meaning of the *Copyright Act*? I cannot think that it is. It seems to me that in order to reproduce the painting you must have something which itself is and would be properly described as a picture, and I avail myself of the suggestion made by Lord Justice *A. L. Smith* during the argument. He asked (and the question seemed to me to test the case very closely), "Supposing the author of these pictures had himself, instead of painting pictures, had these *tableaux vivants* represented upon the stage of some theatre, could he have had a copyright in the *tableaux vivants*?" Could it possibly have been said that the *tableaux vivants* were pictures within the sense of this Act, and does not a reproduction mean something in which, if the original author of the painting had himself produced it, he might have had copyright? I think that is the meaning of this Act of Parliament, and I should come to that conclusion if I rested simply upon the language of the 1st section, and I think that view is confirmed by the language of the subsequent sections. Sect. 6 seems to cover the same ground as sect. 1, and to impose a pecuniary penalty for any act which infringes the rights given by sect. 1, though the words are a little different. They are, if any one "shall without the consent of such proprietor, repeat, copy, colourably imitate, or otherwise multiply for sale, hire, exhibition, or distribution," and so on, he shall forfeit a sum not exceeding £10, "and all such repetitions, copies, and imitations made without such consent as aforesaid and all negatives of photographs made for the purpose of obtaining such copies, shall be forfeited to the proprietor of the copyright." Therefore the Act contemplates I think such a reproduction as results in a picture which can be forfeited under sect. 6. If we apply that to this particular case we see at once that here there is no reproduction of a picture that could be forfeited, for the tableaux are formed by living persons who group themselves according to the design of the original picture. That is an act which does not seem to me to come within the meaning of this statute. If it did it would follow that anybody

who arranges in his own private drawing-room a *tableau vivant* of his friends or guests for the purpose of imitating a group of figures in a well-known picture, would be infringing the *Copyright Acts*, because the element of doing it for reward or remuneration does not enter into the Act which forbids any kind of copying whether for profit or not.

I, therefore, come to the conclusion that what has been done (leaving the background out of the question) is not a reproduction of the paintings in question, and that this appeal must be dismissed with costs.

A. L. SMITH, L.J.:—

The question in this case depends entirely upon the construction of the Act (25 & 26 Vict. c. 68) relating to copyright in works of fine art, and is a small point, though I admit it is of importance.

The Act after reciting that by law as now established, the authors of paintings, drawings, and photographs have no copyright in such their works, and it is expedient that the law should in that respect be amended, enacts "that the author of every original painting, drawing, and photograph shall have the sole and exclusive right of copying, engraving, reproducing and multiplying such painting or drawing, and the design thereof, or such photograph, and the negative thereof, by any means and of any size," and the question is what is the meaning of that enactment? It is provided by the Act that if this right of the author be infringed, he shall have three remedies: he may go for an injunction under sect. 9, he may also go for penalties under sect. 6, and he may go for damages under sect. 11. Now, in construing a section in an Act of Parliament, it is important to look at the whole Act, and not merely at the one section which has to be construed. It is perfectly clear that sect. 6 (which deals with penalties), and sect. 11 (which deals with damages), do not include a case such as we are now asked to bring within the Act. In case the owner of the copyright goes for penalties under sect. 6, it is provided that the piratical imitations are to be forfeited, which can apply only to things of the nature and character of paintings, pictures, or photographs, and not to living beings, for they cannot be forfeited; again,

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if he goes for damages under sect. 11, he is entitled, in addition to damages, to enforce the delivery to him of all unlawful repetitions, copies, and imitations and negatives of photographs, which is equally inapplicable to a case like the present. It is perfectly clear that in these sections the Legislature had in its mind piratical repetitions, copies, and imitations of such a nature that they could be given up to be forfeited when penalties were obtained or damages were recovered.

Now, let us look at the 1st section in the light of sects. 6 and 11. Sect. 1 enacts that "the author of every original painting, . . . shall have the sole and exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing, and the design thereof, or such photograph, and the negative thereof." Now, stopping here: How do you copy, engrave, reproduce, or multiply a painting or drawing? Why, obviously, by something in the nature or character of a painting, picture, drawing, or engraving. But it is said that this gives no effect to the words "by any means and of any size," and that those words include *tableaux vivants*, for the grouping of living persons is a multiplying the picture by other means. I think that it would be straining the Act out of all bounds to apply it to such a case. I am clearly of opinion that when this Act was passed the Legislature never contemplated its including a case like the present. The statute was not framed for that purpose, and putting (to use the language of Sir *George Jessel*) a fair and honest meaning on its terms, I am of opinion that the present application fails.

The appeal must be dismissed.

Scrutton asked for an extension of the terms of the undertaking. He urged that the present form of undertaking would allow the Defendants to destroy the backgrounds if they kept photographs of them, and that they ought not to be allowed to do so, as the Plaintiff, if he recovered damages, would be entitled to have the backgrounds delivered up.

Their Lordships considered that the undertaking was sufficient.

Solicitors: *Herbert Bentwitch; Ashurst, Morris, Crisp & Co.*

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[1892 P. 2893.]

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ROMER, J
Nov. 15, 16, 25
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Highway—Conveyance of adjoining Land—Presumption as to Soil ad medium filum viæ—Rebuttal of Presumption.

In a conveyance by the Defendant to the Plaintiff, a wood which abutted on a highway called *Coldhall Lane* was described by its acreage, which was given with great minuteness, and by reference to a map which did not include any part of the lane. The property was also described in a schedule to the deed, by reference to the numbers in the ordnance map, in which the wood and the lane were marked with different numbers. By the recitals in the deed it was stated that it was one of the conditions of the contract for sale that the trees on the land sold should be paid for as part of the consideration at a valuation, and that such valuation had been made and the amount paid by the Plaintiff. The lane was very little used as a highway, being a grassy lane with trees and underwood on the side adjoining the wood; but evidence was given shewing that none of these trees were included in the valuation:—

Held (affirming the decision of *Romer*, J.) that evidence of the trees being omitted from the valuation was properly admissible as proof of the circumstances under which the conveyance was executed; and that the fact of such omission, coupled with the fact that the lane was not included in the measurement or the map, was sufficient to rebut the presumption that the soil of the lane, *ad medium filum viæ*, passed by the conveyance.

THE action in this case was brought for the purpose of establishing the Plaintiff's title to the soil of a certain highway called *Coldhall Lane*, in the county of *Essex*, to the middle line thereof, including the timber and underwood growing thereon.

By an indenture, dated the 31st of December, 1890, the Defendant, *Lawrence Joseph Petre*, as tenant for life under the *Settled Land Act*, 1882, in consideration of £4998, conveyed to the Plaintiff, *Arthur Pryor*, a farm called *Bearman's Farm*, and certain woodlands known as *King* and *Chapel Woods*, described as comprising 52·645 acres, measured according to the ordnance survey of the parish, and delineated on the plan drawn on the deed, and edged with a pink line. The plan shewed that *King Wood* abutted on the lane called *Coldhall Lane*, from which it was separated on the plan by a pink line. A schedule was also annexed to the conveyance, wherein the property conveyed was described by reference to the numbers appearing on the ordnance

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map as "*King Wood*, No. 77." The portion of the lane claimed by the Plaintiff was not included in No. 77 on the ordnance map, but was numbered separately 5. The acreage of the several closes mentioned in the schedule was given with great minuteness, according to the measurement in the ordnance map, being reduced to three places of decimals. The portion of the lane claimed was not included in the acreage mentioned in the conveyance, nor in any way referred to therein.

The conveyance contained a recital that it was one of the conditions of the contract for sale that, in addition to the purchase-money, the purchaser should pay for all the timber and other trees on the lands agreed to be sold, at a valuation, and that the same had accordingly been valued at £1324 14*s.* 6*d.*, making, with the purchase-money for the land, which was £3673 8*s.* 2*d.*, the total of £4998 2*s.* 8*d.*

It appeared from the evidence that *Coldhall Lane*, although a highway, was very little used for that purpose, but was a grassy lane, averaging about fifty feet in width, with a hedge and ditch on each side. It had never been metalled or repaired, and had only cart tracks here and there. Along the side adjoining *King Wood* were a number of trees and considerable underwood. The Defendant and his predecessors in title had, before the date of the conveyance, occasionally cut timber and underwood there, and used to shoot over it; and game was accustomed to lie and nest there. The value of the trees on the portion of the road claimed was estimated at about £12; but it was proved that they were not included in the valuation of timber on the land sold which was made at the time of the conveyance.

Under these circumstances, the Plaintiff claimed the soil of the road, *ad medium filum viæ*, as included in his conveyance by presumption of law; and the Defendant resisted his claim on the ground that the presumption was rebutted by the terms of the conveyance and the surrounding circumstances.

The action was tried before Mr. Justice *Romer* on the 15th and 16th of November, 1893.

Neville, Q.C., and *Begg*, for the Plaintiff:—

Where a conveyance is made of a piece of land adjoining a

highway, the presumption of law is that the soil of the highway, *usque ad medium filum*, passes, although the conveyance refers to an annexed plan, the measurements and colouring of which would exclude the whole of the highway: *Berridge* v. *Ward* (1). This presumption is not rebutted because subsequent circumstances shew that it was very disadvantageous to the grantor to have parted with half the highway: *Micklethwait* v. *Newlay Bridge Company* (2). The lane in this case is a public way, but the presumption applies whether the road is a public or a private one: *Holmes* v. *Bellingham* (3).

Millar, Q.C., *Hopkinson*, Q.C., and *Ribton*, for the Defendant:—

The question is, whether the presumption is to prevail or the surrounding circumstances of the case are sufficient to rebut it, for the presumption is merely one of law, and only arises where there is no evidence either way, and it becomes necessary to determine the question of ownership: *Beckett* v. *Corporation of Leeds* (4). The circumstances in the present case, when taken altogether, as they must be, are ample to rebut the legal presumption. The separate numbering of part of the lane as a distinct piece of land is similar to one of the matters on which the Court relied in a case in which it was held that the presumption was rebutted: *Marquis of Salisbury* v. *Great Northern Railway Company* (5). Considerations which are different from those which apply in the case of a public highway have to be regarded in the case of a piece of land like this lane, which in correct or even popular language is not a road at all, and which has been used as this has been; and in such a case it takes less to rebut the presumption: *Leigh* v. *Jack* (6); *Plumstead Board of Works* v. *British Land Company* (7); *Duke of Devonshire* v. *Pattinson* (8). In these three cases the presumption was successfully rebutted; but the evidence in the present case is still stronger in favour of the grantor, for, in addition to what has been already stated, the trees in the lane were not included in the valuation which was made, and were not paid for by the

(1) 10 C. B. (N.S.) 400.
(2) 33 Ch. D. 133.
(3) 7 C. B. (N.S.) 329.
(4) Law Rep. 7 Ch. 421.
(5) 5 C. B. (N.S.) 174, 210, 214.
(6) 5 Ex. D. 264.
(7) Law Rep. 10 Q. B. 203.
(8) 20 Q. B. D. 263.

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Plaintiff. In *Berridge* v. *Ward* (1), there was nothing against the presumption except the measurement and the colouring on the plan, which were clearly insufficient to rebut it.

In *Holmes* v. *Bellingham* (2) there had been a previous road which was open to the street. The slight user which has existed in the present case is no more than that which any good landlord would allow to his tenants.

Neville, in reply:—

It is not necessary to shew that a metalled road has ever existed. There was no macadamizing of roads when this doctrine of presumption was established. What occurred with reference to the valuation cannot be received in evidence. The land, which is all we have to do with, was sold for a lump sum. There is nothing in the conveyance to rebut the presumption. The acquisition of the land is of importance to the Plaintiff, as he is the owner of land on the other side of it, and this strengthens the presumption. In *Plumstead Board of Works* v. *British Land Company* (3), there was a building scheme; and in *Marquis of Salisbury* v. *Great Northern Railway Company* (4), the defendants were a railway company; the road was not in their deposited plans, and they had not given notice to treat in respect of it. In *Beckett* v. *Corporation of Leeds* (5), the street was in a town. It is true that all the circumstances may be looked at together, but they must also be examined separately. Whichever way they are taken in the present case, they are insufficient to rebut the presumption.

1893. Nov. 25. ROMER, J:—

The point to be decided in this case is whether the deed of the 31st of December, 1890, passed to the Plaintiff one-half of the lane called *Coldhall Lane*. On the evidence, I think that over that lane there is a public right of way. So that, *primâ facie*, there is a presumption that the half of the lane, so far as it is adjacent to the *King Wood*, included in and conveyed by the deed, did pass by the deed.

(1) 10 C. B. (N.S.) 400.
(2) 7 C. B. (N.S.) 329.
(3) Law Rep. 10 Q. B. 203.
(4) 5 C. B. (N.S.) 174.
(5) Law Rep. 7 Ch. 421.

Then comes the question whether, looking at the deed and the surrounding circumstances, that presumption is rebutted. This question is one about which I have felt considerable doubt; but I have come to the conclusion that the presumption is rebutted. Now, undoubtedly, on the authorities, it is clear that the circumstances (which exist here) that the land conveyed by the deed is therein described by acreage which would not include any portion of the lane, and by reference to a map indorsed on the deed which shews the boundaries of the land as excluding any part of the lane, would not in themselves be sufficient to rebut the presumption; but the surrounding circumstances, and the further facts appearing by the deed to which I am about to refer, are, in my opinion, coupled with the above-mentioned circumstances, sufficient to affirm the Defendant's contention that the half of the lane in question was not intended to pass, and did not pass, by the deed.

In the first place, it is important to see what kind of lane this is. It is a wide grassy lane, averaging forty-eight or fifty feet in width; it has never been metalled or repaired, and has no made road on it, but mere cart-tracks appearing here and there. The south side—the side on which *King Wood* abuts—has numerous timber and other trees and a considerable underwood upon it, extending all along this side of the lane, including the part adjacent to *King Wood*. The part adjacent to *King Wood* alone is in itself between one-half and three-quarters of an acre in extent, and the trees upon this part alone are numerous and of a substantial value—at least £12. The Defendant and his predecessors in title have, before the date of the deed in question, from time to time felled the timber and cut the underwood on this part of the lane, though the Defendant himself has not cut any trees from that part of the southern half immediately adjacent to *King Wood*. This half, therefore, including the part adjacent to *King Wood*, in itself, at the date of the deed, had a value, and was capable of producing profit to the owner as land, and not merely as a way. Moreover, it was shot over by the Defendant and his predecessors in title, and was a place where game was accustomed to lie and to nest, and it had a value to the Defendant in this respect also. I gather from the evidence

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that the lane is a solitary place, not much used by the public, though, as I have said, there is a right of way over it, and carts can and do go over it, where it is not filled by trees and underwood.

Now, it appears to me very difficult to come to the conclusion that the ownership of such a piece of land as this, so far as it abutted on *King Wood*, being valuable, and capable of producing profit, in itself, as land, at the date of the deed, could have been intended to pass by the deed merely by presumption of law as being a road, or because it is coloured on the map on the deed as being a public way. And, indeed, I know of no decided case where a piece of land at all of the character I have described has been held to pass merely by the presumption of law in question.

But the case does not stop there. The property conveyed by the deed of the 31st of December, 1890, is therein described, in the first schedule thereto, by reference to the numbers of the plots as marked on the ordnance survey or map, and in both that schedule and the body of the deed by reference to the acreage shewn by that map. And it may be observed that several of the plots are considerably less than half-an-acre in extent, and the acreage is given with such minuteness as to extend to three places of decimals, *King Wood* being plot No. 77, and described as woodland. On turning to this ordnance map it is found that lot No. 77 is not only marked off from the *Coldhall Lane*, but that the southern half of the lane is shewn to be land bearing trees and shrubs, and a distinct plot in itself, having a separate and distinguishing number of its own, No. 5. This appears to me to assist materially in rebutting the presumption.

The circumstance of the separate numbering of the south part of the lane as a distinct plot is very similar to one of the circumstances occurring and relied upon in the case of *Marquis of Salisbury* v. *Great Northern Railway Company* (1), where the presumption was held to be rebutted.

Lastly, there is this additional circumstance in the case before me. It appears from the recital in the deed that it was part of the contract of sale come to between the parties that the trees on the land sold should be paid for, as part of the consideration,

(1) 5 C. B. (N.S.) 174.

at a valuation to be made, and that the valuation amounted to £1324 14*s.* 6*d.*, and this valuation was paid by the purchaser accordingly. I infer from the deed itself that the trees which, according to the valuation between the parties, had to be valued, and which were in fact valued at £1324 14*s.* 6*d.*, were the trees on the lands referred to and described in the deed, and no others, and accordingly that the trees on the south part of the lane adjacent to *King Wood* were not intended to be, and were not in fact, included in the valuation. And I am glad to know that this inference as to the £1324 14*s.* 6*d.* is in accordance with the fact, for it has been admitted before me on behalf of the Plaintiff—subject to his right to contend that the fact cannot be regarded in this action—that the valuation did not include any of the trees in the lane. So that if the Plaintiffs' contention were correct, and the presumption of law not rebutted by the circumstances of the case, he would get for nothing trees which, in my view, were not sold to or paid for by him.

For these reasons, I think the presumption is rebutted, and the force of the circumstances I have adverted to is not, in my opinion, at all sufficiently met by the fact of the colouring of *Coldhall Lane* on the map indorsed on the deed, or by the facts (assuming them to be facts) that the Plaintiff bought *King Wood* for shooting purposes, and that he was at the date of the deed the owner of the northern half of the lane opposite to that wood.

Before parting with the action I ought to notice briefly one contention of the Plaintiff. It was said that Defendant had not proved sufficiently his title to the southern half of the lane adjacent to *King Wood*, and that the Plaintiff had a possessory title to it sufficient to support this action. But the Plaintiff's case, in his statement of claim, is based solely on his being grantee from the Defendant of this part of the lane under the deed of the 31st of December, 1890, and, moreover, there is no sufficient evidence before me to establish that the Plaintiff has any possessory title apart from that deed.

The action therefore fails, and must be dismissed with costs.

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From this judgment the Plaintiff appealed. The appeal was heard on the 22nd of February, 1894.

Neville, Q.C., and *Begg*, for the Appellant:—

There is nothing in the conveyance or the surrounding circumstances to rebut the presumption of law that the soil of the road *ad medium filum* passed by the conveyance. The fact that no part of the road was included in the annexed plan or in the measurement is not sufficient: *Berridge* v. *Ward* (1). The actual value of the soil of the road and the fact that it was disadvantageous to the vendor to part with it have no bearing on the question. With respect to the omission of the trees growing on the road from the valuation of the timber, it might have happened through mistake. At all events, these extrinsic matters cannot be legally taken into consideration as evidence of the intention of the parties so as to rebut the presumption of law: *Holmes* v. *Bellingham* (2); *Micklethwait* v. *Newlay Bridge Company* (3); *Duke of Devonshire* v. *Pattinson* (4).

Millar, Q.C., *Hopkinson*, Q.C., and *Ribton*, for the Respondent, were not called on.

LINDLEY, L.J.:—

I think this case is very near the line; but the decision arrived at by Mr. Justice *Romer* is right.

The question is a very simple one, whether a strip of land which is part of a highway has passed by the conveyance of some adjoining land or has not. *Primâ facie*, a conveyance of adjoining land will pass the half of the soil of the highway which adjoins the land so conveyed. That point was settled many years ago; the leading case on the subject is *Berridge* v. *Ward*, and it is a very strong case. It is quite sufficient for this purpose to read the marginal note: "Where a piece of land which adjoins a highway is conveyed by general words, the presumption of law is, that the soil of the highway *usque ad medium filum* passes by the conveyance, even though reference

(1) 10 C. B. (N.S) 400.
(2) 7 C. B. (N.S.) 329.
(3) 33 Ch. D. 133.
(4) 20 Q. B. D. 263.

is made to a plan annexed, the measurement and colouring of which would exclude it."

Now the question in this case is whether there are circumstances sufficient to exclude the presumption. In the first place, it must be borne in mind that the presumption is rebuttable. It is a presumption that a piece of land not described in the conveyance which, according to the literal construction of the conveyance, is not included, is nevertheless passed by it. It is a curious legal inference, and an inference that is capable of being rebutted by circumstances which shew that the parties never really intended the omitted land to pass.

What are the facts here? We have a conveyance of a piece of land called *King Wood*. The conveyance refers particularly to the ordnance map, and that is a matter to which I attach considerable importance. The ordnance map shews *King Wood*, and it is thereon numbered 77, and it also shews the lane in question, which has a separate number, because it is in a different parish. When you find the parcels described with reference to the ordnance map, the numbers on that map appear to me to be too important to be left out of account.

Then the recitals are as follows: It is recited that the vendor, who is the tenant for life, has agreed to sell to the purchaser, the Plaintiff, the freehold and copyhold hereditaments thereinafter described and thereby conveyed and assured, and the inheritance of the freehold hereditaments in fee simple in possession, and the customary inheritance of the said copyhold hereditaments free from incumbrances, for the sum of £3673 8*s.* 2*d.* Then comes a recital which is very important: "And whereas it was one of the conditions of the contract that in addition to the purchase-money the purchaser should pay for all timber and other trees on the lands agreed to be sold at a valuation, and the same have accordingly been valued at the sum of £1324 14*s.* 6*d.*, making the whole purchase-money £4998 2*s.* 8*d.*" Therefore, we have here a statement made by these two gentlemen that the timber on the land agreed to be sold has been valued at a certain sum. Now we know as a fact that the trees which were so valued did not include some thirty or forty trees which are upon the strip of land in question. That is an admitted fact. It was said that

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that fact is not admissible in evidence. I cannot understand how in the face of a recital like this we are not entitled to know what trees have been valued in that sum. What we have to address our minds to appears to be whether this presumption is or is not rebuttable; for such a purpose this evidence is of the utmost importance, and is clearly admissible.

Then we come to the operative part, which contains these words: "And also all those woodlands known as *King* and *Chapel Woods*, comprising as to the said woodlands 52·645 acres, measured according to the said ordnance survey . . . . and are also delineated on the plan drawn on these presents, the freehold being edged with a pink line and the copyhold with a blue line." Now, when we turn to the plan, we find, as was the case in *Berridge* v. *Ward* (1), that the pink line, which is the line we have to consider, is so drawn as to all appearance to exclude this strip of land. That, of course, after the decision in *Berridge* v. *Ward*, is not conclusive by any means; neither is the acreage coupled with it sufficient to rebut the general presumption. But when we come to look at the recital with respect to the trees, it appears to me that the learned Judge has decided this case rightly upon that recital and upon the fact that the trees which were valued were trees on the property defined in the parcels, but excluding the slip in question. It is not like the case of a recital that the trees are to be ascertained by subsequent valuation. We are entitled to ask, What trees were valued before the conveyance was executed? And we find they do not include those on this piece of land. One of the several facts which I have mentioned would not be conclusive; but when we join them all together it is difficult to say that this piece of land passed by presumption of law, and that there is not sufficient to rebut the presumption.

I think the decision of Mr. Justice *Romer* is right, and that the appeal must be dismissed.

KAY, L.J.:—

I am of the same opinion. I agree with the decision of the learned Judge in the Court below.

(1) 10 C. B. (N.S.) 400

The question really is whether or not the presumption which, I think, arises in this case, that the land *ad medium filum* of *Coldhall Lane* passed by the conveyance, is rebutted by circumstances which the Court is bound to regard. Those circumstances Lord Justice *Lindley* has enumerated. First of all, on the face of the deed, the acreage given does not include any part of this road; secondly, it is described by reference to the ordnance map, and the numbers on the ordnance map are copied on the map which is part of this conveyance. This moiety of the road is included in a piece numbered 5, and No. 5 is not referred to in the deed. That is another point. Then you find upon that map on the deed that the freehold land, which includes this wood, is edged with a pink line, and this pink line is so drawn as not to include one moiety of the road. Again, the schedule in this deed mentions, as I have said, the wood by its number on the ordnance map, and gives the acreage of the wood, as the learned Lord Justice has pointed out, down to three figures of decimals—that is, down to the thousandth part of an acre. Certainly that is a very strong thing to shew that the acreage of this part of the lane, which would be I do not know what, but would amount to something, is not *primâ facie* included in the parcels of this deed.

However, I agree that those facts alone, after the decision of *Berridge* v. *Ward* (1), although they are very strong and significant, might not be enough to rebut the presumption; but then we have another fact, which, added to those facts, to my mind does turn the scale. The presumption is, I think, rebutted by an accumulation of facts, a few of which alone, or it may be any of which alone, might not be enough to rebut it; but when you get the force of the whole accumulation, that accumulation seems to me, as the learned Judge has held, sufficient to rebut the presumption. Upon that fact a question of evidence has been raised.

Before I refer further to the facts, I will read the language of the Court of Appeal in the case of *Duke of Devonshire* v. *Pattinson* (2), the judgment in which case was given by Lord Justice *Fry*, and agreed in by the other members of the Court:

(1) 10 C. B. (N.S.) 400. (2) 20 Q. B. D. 263, 273.

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"By the deed of the 21st of March, 1846, the Duke conveyed to Messrs. *Dixon* the *Castle Saucery*, described as a close bounded by the River *Eden* on or towards the north, and the deed contained the usual general words. The defendants rightly contend that to such a deed as this, containing such a description of a close, there applies the well-known presumption that, although the close is described as bounded by the river, yet that the grant carries with it a moiety of the bed of the river, and they have further contended that this presumption can be repelled only by words in the deed itself. In our opinion, this latter contention cannot be maintained, for we hold that the presumption may equally be rebutted by the circumstances under which the deed was executed." Then the learned Lord Justice refers to the cases of *Beckett* v. *Corporation of Leeds* (1), *Marquis of Salisbury* v. *Great Northern Railway Company* (2), and *Micklethwait* v. *Newlay Bridge Company* (3), and then he continues: "The conclusion that you may regard the circumstances under which a deed is executed as rebutting the presumption is only an illustration of a wider principle. 'In deeds, as well as in wills,' said Lord *Wensleydale*, in *Waterpark* v. *Fennell* (4), 'the state of the subject at the time of execution may be inquired into.'" I will not read further, because that which is further stated refers to the particular circumstances of that case.

The fact to which I am going to refer is what Lord Justice *Lindley* has already mentioned. In this deed there is a recital which runs thus:—[His Lordship read the recital respecting the valuation of the trees, and continued:—] Now, it is said you cannot look to see what trees were included in that valuation. I want to know why not. The words I read from the judgment in the case of *Duke of Devonshire* v. *Pattinson* (5) certainly include that, and not only was this valuation a circumstance under which the deed was executed, but it is a circumstance referred to on the face of the deed, and therefore it seems to me, by all the principles of evidence, that, in order to understand what this deed means when you are applying it to the subject-matter

(1) Law Rep. 7 Ch. 421.
(2) 5 C. B. (N S.) 174.
(3) 33 Ch. D. 133.
(4) 7 H. L. C. 684.
(5) 20 Q B D. 263, 273.

which it purports to convey, you may and must inquire what were the trees which were valued.

I will put an illustration which I suggested during the course of the arguments. Suppose the words had been "the trees which are in number 372," or any number you like, is it possible to say that you may not inquire what those 372 trees were? Lord Justice *A. L. Smith* put another illustration. Supposing it had been "all the trees marked with a cross," is it possible to say that you might not inquire what trees they were which were marked with a cross? On the face of the deed you have a statement that the trees on the land sold had been valued, and the value brought out to a few pence, and if you know what those trees were it assists you in determining whether this presumption as to the passing of the land *ad medium filum viæ* was rebutted or not; for the fact is, that although upon that land there are growing trees, the value of which is stated to us to be £12, not one of those trees is included in this valuation.

But it was said in argument, "There may have been a mistake in the valuation." But we have no right to presume a mistake. Here we have a deed which we have to construe. We cannot rectify the deed, or deal with anything outside the deed. We have to construe the deed and apply it to the subject-matter to which it refers, and the question is strictly parcel or no parcel, aye or no, did this lane *ad medium filum* pass by this deed? It is impossible to maintain that we can assume that any mistake was made. It seems to me that this is a fact which we must treat as though the vendor and purchaser had themselves met and agreed what trees should be valued, and had themselves determined that the trees on this part of the land were not to be valued. And why? The only reason that can be imagined is because this part of the lane was not included in the sale. To my mind, that distinguishes this case from *Berridge* v. *Ward* (1). There is a fact here that did not occur in *Berridge* v. *Ward* which, coupled with all the other circumstances to which I have referred, seems to me to be enough to rebut the presumption of law that the land *ad medium filum* of this road passed by this deed. I therefore think the decision of Mr. Justice *Romer* was right, and that this appeal should be dismissed.

(1) 10 C. B. (N.S.) 400.

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A. L. SMITH, L.J.:—

I am of the same opinion. This action is brought by Mr. *Pryor* to restrain Mr. *Petre* from cutting down some trees in a lane which is called *Coldhall Lane*, and I must say that I agree with what has fallen from Mr. *Neville*, that, considering the utmost value which can be put upon this timber is £12, and considering the purchase-money comprised in the deed of the 31st of December, 1890, amounted to nearly £5000, this is a lamentable dispute upon a very small matter, and I would further point out that, as regards the game value of this piece of land, it is absolutely worth nothing to the Defendant, whereas it may be of great importance to Mr. *Pryor*, the purchaser.

Having said this, I must now deal with this case as best I can according to law. I still maintain the proposition which Mr. *Neville* disputed, that if everything in the deed is looked at Mr. *Pryor* cannot make out that he purchased this *locus in quo*. If the deed alone is looked at, it is shewn by the plan and by the acreage referred to therein that this land is not included, and if the deed alone is looked at and nothing more, Mr. *Pryor* cannot prove his case. But he is entitled to go further, and he is entitled to say that there is a way running on the north side of *King Wood*—it does not matter whether it is a highway or an occupation way—and, therefore, according to the presumption of law which has now been long settled and is past recall, the presumption is, that when *King Wood* was conveyed to Mr. *Pryor*, there was conveyed to him the land up to the middle of *Coldhall Lane*. But that presumption is a rebuttable presumption, as all such presumptions are; and if it can be shewn from the circumstances existing at the time when the conveyance was executed that that *primâ facie* presumption is rebutted, then those circumstances are admissible in evidence for that purpose.

Now, Mr. *Neville* stated that the circumstances relating to these trees were not evidence in this case. I do not agree with him. The passage read by Lord Justice *Kay* from Lord Justice *Fry's* judgment in the case of *Duke of Devonshire* v. *Pattinson* (1) sets that point at rest, and I will also read what I believe to be a short *résumé* of the law from the judgment of Lord Justice

(1) 20 Q. B. D. 263.

Lopes in *Micklethwait* v. *Newlay Bridge Company* (1), which sums it up in the shortest and clearest possible manner. The Lord Justice there says: "The law appears to me to be this: that if land adjoining a highway or a river is granted, the half of the road, or the half of the river is presumed to pass, unless there is something, either in the language of the deed or in the nature of the subject-matter of the grant, or in the surrounding circumstances, sufficient to rebut that presumption." It has been held that acreage describing the land sold and a plan is not sufficient: *Berridge* v. *Ward* (2).

Now, what is there here to rebut the presumption? There is a recital in the deed that prior to its execution the value of the trees upon the land which was to be conveyed by the deed amounted by a valuation then made to £1324 14*s.* 6*d.*, and when this is looked into, it is found that not one of the trees on the land in dispute was included in that valuation, which is legitimate evidence to shew that the land whereon they stood was not included in the conveyance, and thus the *primâ facie* presumption is rebutted. Supposing just before signing the deed the vendor and vendee had walked the bounds, and had walked along the north side of the wood, and had recited this fact in the deed, evidence of where they walked would have been admissible, and this would negative the presumption. I do not think it would have been necessary to recite this fact in the deed, because proof could have been given of the fact when it came to a question of parcel or no parcel as to what had in reality been done. I can see no difference between the marking of trees and valuing them, as has been done in this case, or walking the bounds. I come to the conclusion that the evidence was admissible, and applying it to the ordinary presumption which arises, that ordinary presumption is rebutted. The evidence is not given to contradict the deed, but to contradict a presumption and nothing more.

On these grounds I am of opinion that Mr. Justice *Romer* was right, and that this appeal must be dismissed, and with costs.

Solicitors: *Duffield & Bruty; A. G. Maskell,* agent for *Maskell & Arthy, Chelmsford.*

(1) 33 Ch. D. 133, 155. (2) 10 C. B. (N.S.) 400.

M. W.

C. A.
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Feb. 26.

In re THE TRADE-MARK OF LA SOCIÉTÉ ANONYME DES VERRERIES DE L'ETOILE.

Trade-mark—Registration—Rectification—Mark resembling another already on Register—Colour—"Calculated to deceive"—"Person aggrieved"—Expunging—User—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 67, 72 *sub-s.* 2, 90—*Patents, Designs, and Trade Marks Act,* 1888 (51 & 52 *Vict. c.* 50), *ss.* 10, 14.

Where one trader has registered a device, another trader cannot register a description in words of that device, even though he adds a specific colour.

B. & Co. carried on business in *London*, as dealers in window-glass, which they purchased in *Belgium* and shipped to *Australia* and other colonies. In 1876 they registered as a trade-mark the device of a star, which they had used in connection with their glass since 1875; and their glass was known in the trade by the designation of "Star," or "Star Brand."

In 1885 a Belgian glass company registered in *Belgium*, as a trade-mark for glass, the device of a red star, which they had used there since 1880. In 1890 they registered in *England*, as a trade-mark for window-glass, the words "*Red Star Brand*," without any device. They sent large quantities of glass to *England* in cases marked with a red star, but did not deal directly with the colonies. *B. & Co.*, having discovered that glass was being sold in *New Zealand* under the description of "*Red Star Brand*," moved to expunge the Belgian company's mark from the register:—

Held (affirming *Stirling*, J.), that the Belgian company's mark must be expunged on the ground that it so nearly resembled *B. & Co.'s* mark as to be calculated to deceive.

APPEAL of *La Société Anonyme des Verreries de l'Etoile* from Mr. Justice *Stirling* (1).

In addition to the facts stated in the former report, it appeared from the evidence that the Appellants, *La Société*, had been doing a very large business in the *United Kingdom*, having for some years sold annually upwards of £30,000 worth of glass in cases bearing the device of a red star upon them; that *La Société*, in their dealings with British firms, was known as the "*Red Star Glass Works Company*"; that if "Red Star" glass was asked for in the home trade, their glass was always understood to be

(1) [1894] 1 Ch. 61.

required; and that, to protect the custom that had sprung up, the words "*Red Star Brand*" had been registered by them in *England*. There was also evidence on the part of *La Société* that orders for "Star" glass were considered to refer to their glass. It also appeared that in and since 1875 Messrs. *Brooks & Co.* had been in the habit of frequently receiving orders either for "Star" or "Star Brand" window-glass, their glass being commonly known in the trade as "Star" or "Star Brand."

Moulton, Q.C., and *Roger Wallace*, for the Appellants, *La Société*, in addition to their argument in the Court below, urged that, if the mark were expunged, Messrs. *Brooks & Co.* would be enabled to sell their goods as "Star" glass, a name or mark which had become attached to the Appellants' goods, and so jeopardize the Appellants' trade; and would, moreover, commence an action for infringement of the mark; also, that the Court ought not in the exercise of the discretion given to it by sect. 90 of the *Patents, Designs, and Trade Marks Act*, 1883, to make an order for expunging the mark.

Hastings, Q.C., and *J. Cutler*, for the Respondents, Messrs. *Brooks & Co.*, were not called upon.

LINDLEY, L.J.:—

This case is an important one unquestionably, not only to the *Société Anonyme des Verreries de l'Etoile*, but to persons interested in trade-marks generally. The case is peculiar, and for this reason: Messrs. *Brooks & Co.*, who in 1876 registered as their trade-mark for glass a star, complain of a trade-mark which does not consist of a star, but consists of the words "*Red Star Brand*." At first sight, these seem to be or might be two different marks; but in order to consider whether they are or not, and in order to see whether the Belgian society's trade-mark is calculated to deceive, one must consider what Messrs. *Brooks & Co.'s* rights are under their registered mark of a star. That depends on sect. 67 of the Act of 1883, which is as follows: "A trade-mark may be registered in any colour, and such registration shall (subject to the provisions of this Act) confer on the regis-

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tered owner the exclusive right to use the same in that or any other colour." So that Messrs. *Brooks & Co.*, if they chose, could use this star for their glass in any colour they liked—green, red, blue, orange, or anything else. That being the case, it seems obvious that the Belgian company could not register in *England*, for glass, a red star. Now, it does seem a little startling that if they cannot register a simple red star they should be enabled to register the description of that very same thing in words—that is to say, that although they cannot appeal to the eye, they may appeal to the ear. I cannot say that is right, and that I understand is the real view taken by the learned Judge below. Two marks may be calculated to deceive either by appealing to the eye or to the ear, or by one appealing to the eye and one to the ear. Finding that the Applicants' glass is sold as "Star" glass or "Star Brand" glass, and bearing in mind that the star may be in any colour, I cannot say that "*Red Star Brand*" is not calculated to deceive.

So far I think the Applicants are aggrieved, and I think it is quite plain that, if now the Belgian company were seeking to register the words "*Red Star Brand*," in the face of the evidence before us the Comptroller would decline to register those words on the ground that they were not a proper trade-mark, having regard to the existing registered trade-mark of Messrs. *Brooks & Co.* But that is not quite this case. The question now is, not whether the Belgian company should be permitted to register this trade-mark, for they did in fact register it in 1890, but the question is whether the trade-mark so registered ought to be expunged. This is a strong step to take, no doubt, and to expunge it after some three years' enjoyment is stronger still.

At first I was disposed to think that there might be some difficulty on the part of Messrs. *Brooks & Co.* in expunging after the lapse of three years; but the delay is explained. It was explained to the satisfaction of the learned Judge below; and it is explained now to our satisfaction. The real truth is that, for reasons which I will give presently, Messrs. *Brooks & Co.* did not in fact know of this registration. How it came to pass that they did not know, considering that the Belgian company

must have advertised their application, is, I think, tolerably obvious. Messrs. *Brooks & Co.*, although they carry on business here, are exporters. They do not sell in this country. There is nothing to prevent their selling. They might expand their business to-morrow for anything I know, but in fact they have not done so. They are export merchants; and it may well be that, being export merchants, they have not paid that attention to the registration of marks for the sale of goods in this country which they would have done if their business had been a retail or wholesale business in this country. That may possibly explain the fact that they did not know, notwithstanding the advertisement, that the Belgian company had, so long ago as 1890, registered this mark, "*Red Star Brand.*" They have found out only quite recently that the Belgian company's glass—this "*Red Star Brand*"—is competing with their glass in *New Zealand*, where they also have a registered trade-mark. Having discovered that, they say, "We will see if we cannot expunge this mark (the '*Red Star Brand*') of the Belgian company." I think they are entitled to do so. It does not at all follow from this, nor is it to be inferred from this, that Messrs. *Brooks & Co.* could get an injunction to restrain the Belgian company from using this brand. I say nothing about that. But I think Messrs. *Brooks & Co.* are entitled to have the trade-mark "*Red Star Brand*" expunged from the trade-mark register; and, therefore, the appeal must be dismissed with costs.

KAY, L.J.:—

I am of the same opinion. The application is made under sect. 90 of the *Patents, Designs, and Trade Marks Act*, 1883, as amended by sect. 23 of the Act of 1888. Under sect. 90 the Court may, "on the application of any person aggrieved . . . . by any entry made without sufficient cause in any such register, make such order for making, expunging, or varying the entry as the Court thinks fit." Therefore, the question is whether the applicant can shew that the entry of which he complains, and which he seeks to have expunged, has been made without sufficient cause. Now, I turn back to sect. 72, and there it is enacted that "Except as aforesaid the comptroller shall not

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register with respect to the same goods or description of goods a trade-mark having such resemblance to a trade-mark already on the register with respect to such goods or description of goods as to be calculated to deceive." The words in the former Act were "so nearly resembling." They have been altered by expunging those words and substituting "having such resemblance to."

Now, first of all, what does "calculated to deceive" in that section mean? It must mean calculated to deceive by the use of the mark, not by its being merely on the register, but by the use that may be made of it. The question here is certainly a new one. The Applicants, Messrs. *Brooks & Co.*, have registered the device—a star—without any words at all, and the persons against whom they are applying have registered, since the Act of 1888, the words "*Red Star Brand*" without any device. I doubt whether that could have been done under the Act of 1883, for then the mark must have been a fancy word or a device. I do not think "device" would include a series of words like this. Under the Act of 1888 it seems that words may be registered, because by sect. 64, sub-sect. (*e*), among the things that may be registered are, "A word or words having no reference to the character or quality of the goods, and not being a geographical name." I presume the words "*Red Star Brand*" were registered under that sub-section.

Now, have the words which the *Société*, the Respondents to this application, have registered such a resemblance to the trade-mark which the Applicants have put on the register as to be calculated to deceive? Mr. *Moulton*, in his argument, admitted that the Applicants having registered the device—the picture of a star—the Respondents could not register the word "Star," nor could they register the words "Star Brand." I think that is quite obvious, because, although one appeals to the eye and the other to the ear, they would so nearly resemble as to be calculated to deceive. But Mr. *Moulton* rested his argument chiefly upon the fact that the words "*Star Brand*" were preceded by the word "*Red*." He said that made all the difference; and that "*Red Star Brand*" did not so nearly resemble the device of the star without any colour at all as to be calculated to deceive. Then

one cannot help remembering sect. 67, which provides, in effect, that the Applicants, having registered the star without colour, may use that star in any colour they like. Therefore they may use a red star; and accordingly the addition of the word "*Red*" does not seem to me to help the Respondents, because they are in this position—they could not have registered a picture of a star in any colour, and if they had tried to register a red star they would have been met at once by sect. 67. So, finding they are unable to register a picture of a red star, they try to escape the Act of Parliament by registering the words "*Red Star.*" To my mind the words "*Red Star*" do so nearly resemble the device of the star which the Applicants have registered as to be calculated to deceive, and I confess I should come to that conclusion even without the evidence that is before us; but the evidence that is laid before us, particularly the evidence of the Respondents' witnesses, seems to me to put that absolutely beyond question, because a number of them say that, if glass was inquired for by the word "Star" only, they should deem it to mean the Respondents' glass. If using the word "Star" for glass is using that which would be taken to mean the Respondents', this would seriously interfere with the Applicants' trade; and if the Respondents might put upon the register the word "Star," which everybody would understand to mean the Respondents' glass, all I can say is that they would then be putting upon the register a thing so nearly resembling the star of the Applicants as to be calculated to deceive.

The only other question is whether there has been so much delay that the Applicants should, on that ground, be refused relief. I think the evidence deals with that point effectually. The Applicants did not know, until within a very few weeks before their application was made, that this had been registered, and therefore there is no question of delay. They came as soon as they could. They were led to the discovery by this fact—that they found in the colonies, where their principal trade is carried on, that they were being competed with by glass under the name of the "*Red Star Brand.*" That put them upon inquiry, and then they found, I understand, that these words, "*Red Star Brand,*" were upon the register in *England.* I think,

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therefore, the decision of the learned Judge was right, and the appeal fails.

A. L. SMITH, L.J.:—

I agree. I have nothing to add.

Solicitors: *Ernest Salaman & Co.; Paddison, Fullilove, Cummins, & De la Chapelle.*

G. I. F. C.

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KEKEWICH, J.
Dec. 7.
C. A.
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Jan. 15, 16, 17; *Feb.* 3, 20.

ROUSE *v.* BRADFORD BANKING COMPANY.

[1893 R. 384.]

Debtor and Creditor—Partnership Debt—Retiring Partner—Principal and Surety—Giving Time—Release of Surety—Authority given by Deed of Dissolution to obtain Time—Covenant to indemnify retiring Partner.

The Plaintiff and three other persons were partners, and jointly and severally liable to a bank for a large overdrawn balance. The Plaintiff retired from the business, which was thenceforth carried on by the other partners. The Plaintiff assigned his share to the other three, and they covenanted to pay all the debts of the firm, and indemnify him against them: provided always, that he should not be entitled to require them to pay any of the debts so long as he was kept indemnified against all claims in respect of them. The bank were aware of the terms of this agreement. The new firm opened a new account with the bank; but the old debt was kept separate, the bank charging the new firm compound interest on it, and allowing them interest on their new account. On the 16th of February, 1889, the balance then due being £50,000, the new firm applied to the bank for an increase of their overdraft to £53,000 till the 14th of March, and this application was granted for valuable consideration. The new firm afterwards executed a deed for the benefit of their creditors under which the bank received a dividend, and then made a claim for the balance of the old debt against the Plaintiff:—

Held, by *Kekewich*, J., that notwithstanding *Swire* v. *Redman* (1), it must be taken to have been decided by *Oakeley* v. *Pasheller* (2), that if a creditor has two principal debtors, one of whom, by subsequent arrangement between themselves to which the creditor is no party and does not assent, becomes primarily liable for the debt, and such arrangement is notified to the creditor, the one secondarily liable has thenceforth the rights of a surety as against the creditor, and is discharged if time is given to the other debtor; and that as the arrangement of February, 1889, was a

(1) 1 Q. B. D. 536. (2) 4 Cl. & F. 207; 10 Bli. (N.S.) 548.

giving of time to the new firm, the bank had lost their claim against the Plaintiff:

Held, by *Lindley* and *Kay*, L.JJ. (*A. L. Smith*, L.J., dissenting), that the view taken by *Kekewich*, J., of the decision in *Oakeley* v. *Pasheller* (1), was correct.

But *held*, by *Lindley* and *A. L. Smith*, L.JJ. (*Kay*, L.J., dissenting), that the terms of the dissolution were such as to authorize the new firm to obtain time, if necessary, to pay the old debt; and that the Plaintiff, therefore, was not released by time being given to the new firm.

THE Defendant company was an old banking company, registered as a limited company under the *Companies Act*, 1862. The Plaintiff was a duly registered shareholder in that company in respect of fifty-five shares, and he held those shares when he became indebted to the company, as hereinafter mentioned. By the company's articles of association the company was entitled to a lien on the shares of those members who were indebted to it.

In 1878 the Plaintiff, *William Rouse*, and three of his brothers, *John Frederick Rouse*, *Frank Rouse*, and *Herbert Rouse*, became partners as worsted spinners and manufacturers, and carried on business in partnership under the name of *William Rouse & Co.* The firm opened an account with the Defendant bank, and by a deed, dated the 9th of May, 1878, the Plaintiff and his co-partners covenanted jointly and severally with the bank to pay what might be, or become, due to the bank from the firm on its banking account; and the Plaintiff and his co-partners mortgaged their partnership property to the bank to secure the same. After this the firm became considerably indebted to the bank, and, at the end of 1884, the balance due from the firm to the bank amounted to £55,000, or thereabouts, for the payment of which, under the covenants contained in the deed of May, 1878, the Plaintiff was liable, severally as well as jointly, to the bank.

On the 31st of December, 1884, the partnership expired by effluxion of time, and the Plaintiff retired from the firm. Its business was, however, continued by the other partners under the old name, and no new partner came in.

On the 17th of April, 1885, a deed of dissolution was executed by the Plaintiff and his late co-partners. This deed recited the articles of partnership and the expiration of the partnership by

(1) 4 Cl. & F. 207; 10 Bli. (N.S.) 548.

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effluxion of time on the 31st of December, 1884: that it had been agreed that the Plaintiff should withdraw from the business as from that date, and that the other partners should carry it on, and that notice of the dissolution should be inserted in the *London Gazette*: that an account had been taken, under which the Plaintiff's share in the capital and effects of the partnership had been ascertained to amount to £2669 8*s.* 4*d.*: that the Plaintiff had agreed to assign his share and interest in the partnership assets to the continuing partners, and that they had agreed to indemnify him from the partnership debts and liabilities: that the parties had agreed to execute mutual releases: and that the Plaintiff had agreed to leave the said sum of £2669 8*s.* 4*d.* in the business. The deed then contained a release and assignment of the Plaintiff's share and interest in the assets to his copartners for their own use. The Plaintiff then (*inter alia*) covenanted to allow and confirm whatsoever the continuing partners, or any of them, their or any of their executors, administrators, or assigns, should lawfully do, or cause to be done, in the premises. And the continuing partners jointly and severally covenanted with the Plaintiff that they, or some or one of them, their, or some or one of their, heirs, executors, or administrators, would, with all convenient speed, pay all the debts and sums of money due from the late partnership and all or any of the parties to the deed in respect thereof, and which appeared in the books of account of the late partnership, and perform all other the engagements of the late partnership, or to which the parties or their respective heirs, executors, or administrators or any of them were, was, or should be liable on account of the partnership; and would keep indemnified the Plaintiff, his heirs, &c., against all losses, damages, costs, and expenses which should or otherwise might be sustained or incurred or become payable for or by reason of the non-payment or non-performance of any of the said debts, sums of money, or engagements, or in anywise relating thereto, or for or by reason of any action or other proceeding which should be brought or promoted in relation thereto: "Provided always, and it is hereby agreed and declared, that the said *W. Rouse*, his executors and administrators, shall not be entitled to require payment of any of the said

debts or sums of money hereinbefore covenanted to be paid by the said *J. F. Rouse*, *F. Rouse*, and *H. Rouse*, so long as the said *W. Rouse*, his heirs, executors, and administrators shall be indemnified according to the covenant last hereinbefore contained." The deed then contained a mutual release of all partnership claims and demands, and a covenant by the continuing partners with the Plaintiff to pay him the said sum of £2669 8*s.* 4*d.*, with interest at 5 per cent., with a proviso that the Plaintiff should not require payment for five years from the date of the deed, if the continuing partners or any of them should so long live and should continue to carry on the business of the firm and to pay the interest regularly.

On the 21st of April, 1885, a notice of the dissolution, dated the 9th of February, 1885, was inserted in the *London Gazette.* This notice was signed by the Plaintiff and by his late co-partners. The notice stated the dissolution on the 31st of December, 1884, and that all debts due to and from the late firm would be received and paid by the continuing partners, who would continue to carry on the business on their own account, under the old name of *William Rouse & Co.* The Defendant company knew of the notice in the *Gazette,* but there was no distinct evidence to shew whether they did or did not know anything more. It was conceded, however, that the Defendant company knew that the continuing partners were to take over the assets and liabilities of the old firm, and were to pay and indemnify the Plaintiff against those liabilities, including the debt to the bank.

The new firm continued to bank with the Defendant company, and a new account was opened with the new firm. The old debt of £55,000 was, however, not brought forward into this new account, but was always kept separate and distinct. The bank charged the new firm compound interest on the old debt, and commission; but, on the other hand, allowed the new firm interest on its new account, which was always in credit. The balance, however, of interest and commission thus arrived at was added to the old debt, which, in February, 1889, amounted to £67,000. The amount then standing to the credit of the new account was £17,000; so that, if this were set against the £67,000, £50,000 would be due to the bank. The old firm had, as mentioned

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above, given a mortgage to the bank to secure the balance due on their account, and £50,000 was the normal limit of the overdraft which had been allowed by the bank by a resolution of December, 1886.

In February, 1889, the new firm desiring a further advance of £3000—that is, to increase the overdraft to £53,000—*J. F. Rouse*, one of the partners, applied "for an overdraft of £53,046 until the 14th of March:" and the directors, on the 16th of February, 1889, passed a resolution which, after mentioning certain conditions, proceeded: "Under these conditions it was resolved that the application be granted"; and on the 18th of February, one of the members of the new firm wrote a letter of thanks on behalf of the firm to the directors. The conditions were that the firm should take steps at once to wind up the manufacturing department, which it was stated would release about £15,000 of capital, and should apply for a reduction of the claims of the sisters of the partners on a mortgage which was prior to that of the bank. These conditions were complied with.

In July, 1890, the new firm again applied to the bank for assistance; and in August, 1890, the bank agreed to make the firm further advances to the extent of £18,000 on receiving certain guarantees from two other gentlemen. The securities taken by the bank on this occasion were dated the 11th of August, 1890, and were, in substance, agreements by the new firm and the sureties to pay one day after demand all moneys due from the new firm to the bank, with a proviso that the liability of the sureties should be limited to £2500 each, and should cease as soon as the liability to the bank should be reduced to £45,000. These securities did not otherwise refer to or affect the old debt, for which alone the Plaintiff was responsible, and the Plaintiff was not a party to the agreement.

On the 16th of September, 1892, the new firm stopped payment, and executed a deed for the benefit of their creditors. Under this deed the bank claimed to prove as joint creditors for the amount due to them. The proof was at first disputed, on the ground that the bank's right to prove was not against the joint estate of the new firm, but only against the separate estates of the partners; but the proof was ultimately admitted, and the

bank received a dividend of 10*s.* in the pound on their debt; but there still remained due to them in respect of their old debt a sum exceeding the value of the Plaintiff's shares.

The company claimed a lien on the Plaintiff's shares for the balance due to them, and refused to pay him the dividends. The Plaintiff thereupon commenced this action, claiming a declaration that he was entitled to his shares free from any lien; payment of the dividend which had accrued; and an injunction to restrain the company from dealing with the shares.

The company by their defence insisted on their lien, and counter-claimed a declaration that they were entitled to such lien, and an order on the Plaintiff to pay what was due.

The action came on for trial before Mr. Justice *Kekewich* on the 7th of December, 1893.

Renshaw, Q.C., and *F. Thompson*, for the Plaintiff:—

The joint liability of the Plaintiff and the new firm is gone, otherwise the bank could not have been admitted to prove against the new firm in the bankruptcy: *Ex parte Janson* (1). The Plaintiff was released from his liability for the £55,000 through the acceptance by the bank of the liability of the three remaining partners only; so that there was a complete novation by the substitution of the liability of those three partners for that of the original four: *Lindley* on Partnership (2); *Thompson* v. *Percival* (3); *Bilborough* v. *Holmes* (4); *Hart* v. *Alexander* (5); *Evans* v. *Drummond* (6). If the Plaintiff was liable at all it was only as surety for the new firm; but from that liability he was discharged through time being given to the principal debtors, thus prejudicing his position as surety: *Oakeley* v. *Pasheller* (7); *Pooley* v. *Harradine* (8); *Overend, Gurney & Co.* v. *Oriental Financial Corporation* (9). Having regard to the last case, *Swire* v. *Redman* (10) cannot now be supported.

(1) 3 Madd. 229.
(2) 6th Ed. Bk. ii. Chap. ii. s. 3, pp. 246, *et seq.*
(3) 5 B. & Ad. 925.
(4) 5 Ch. D. 255.
(5) 7 Car. & P. 746; 2 M. & W. 484.
(6) 4 Esp. 89.
(7) 4 Cl. & F. 207; 10 Bli. (N.S.) 548.
(8) 7 E. & B. 431.
(9) Law Rep. 7 H. L. 348, 360.
(10) 1 Q. B. D. 536.

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[They also referred to *Bechervaise* v. *Lewis* (1).]

[KEKEWICH, J., intimated that he should hold, upon the facts, that on the dissolution of the old firm in April, 1885, the course of conduct pursued by the bank was not sufficient to discharge the Plaintiff; and called upon the Defendants' counsel only on the questions whether, upon the dissolution, the Plaintiff became merely a surety for the new firm, and whether he was not discharged by the bank agreeing, in February, 1889, and August, 1890, to give time to the new firm.]

Warmington, Q.C., and *Vernon R. Smith*, for the Defendants, the bank:—

The Plaintiff's liability as principal debtor, as it existed immediately before the dissolution, continued after the dissolution, and he was in no way discharged by the bank. Accordingly, he still remains a principal debtor, and therefore cannot now say he is a surety only. It is not correct to say that, where one partner retires and assigns his share of the partnership assets to the continuing partners, and they covenant to indemnify him against the debts, that creates the relation of principal and surety between them. His position may be analogous to that of surety; but it has never been laid down that the true relation, even assuming that the creditor has assented, is that the continuing partners are the principal debtors, and that the retiring partner is liable only as a surety. It is difficult to see how, without the creditor's assent, the original relation can be altered. If there is no contract altering the original relation, that of surety does not exist. The Court cannot apply the law of principal and surety to a case of this kind. The analogy of a quasi-suretyship is a false one: *Lindley* on Partnership (2). The Plaintiff's original position as principal debtor was not changed by the guarantees of August, 1890, for he was no party to them, and his position could not be changed without his consent; neither did those guarantees imply any change of his position. But even assuming the Plaintiff was in the position of a surety, there was no giving of time sufficient to discharge him: *Clarke*

(1) Law Rep. 7 C. P. 372. (2) 6th Ed. p. 258, n. z.

v. *Birley* (1). There was no binding contract between the bank and the new firm which could have been enforced by the latter. The two accounts were kept entirely distinct, and the bank were at liberty to deal as they thought fit with the new firm in respect of the account with them: *In re Sherry* (2). In *Oakeley* v. *Pasheller* (3), as is pointed out in *Lindley* on Partnership (4), the *ratio decidendi* was that there was a new contract with the new debtors; and *Swire* v. *Redman* (5) is a direct authority that a distinction is to be drawn between cases where the two debtors are both principals in the first instance, and cases where one of them is not a principal debtor in the first instance, but a surety only; and that the principle of *Oakeley* v. *Pasheller* does not apply to the second class of cases, to which the present case belongs.

In re Head (6) is in our favour, as shewing how strong a case is required to make out a novation of contract.

KEKEWICH, J.:—

On the main question, whether the Plaintiff, Mr. *William Rouse*, has been discharged by the bank, I have not entertained any doubt since I was once in full possession of the facts, and I did not call upon counsel for the bank to argue that point.

A question of this kind has to be taken in two steps. In the first place, it is necessary to consider whether the creditor has a right against the new firm, that is to say, the person alleged now to be the debtor; and, secondly, whether, besides being a creditor of that new person, when that has been established, he is a creditor also of the former debtor into whose shoes the new debtor has stepped. It is an advantage to the creditor to have two debtors, and to retain whatever solvency or right of proof there may be against the old debtor, notwithstanding the constitution of a new debtor; and, that advantage being obvious, the law does not assume discharge without either clear evidence of an agreement or such conduct as leads to the inference that the discharge has taken place. It would be idle and waste of

(1) 41 Ch. D. 422.
(2) 25 Ch. D. 692.
(3) 4 Cl. & F. 207; 10 Bli. (N.S.) 548.
(4) 6th Ed. p. 259.
(5) 1 Q. B. D. 536.
(6) [1893] 3 Ch. 426.

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time now to refer to the many authorities on the subject, because the law is thoroughly well settled, and has been made the subject of many decisions in recent times, to say nothing of more ancient times. The first step was fully discussed in the case of *In re Commercial Bank Corporation of India and the East* (1), where *Selwyn*, L.J., in giving judgment, referred to some observations of *Wigram*, V.-C., in the case of *Benson* v. *Hadfield* (2). The case of *Benson* v. *Hadfield* did not decide the point, because the point in that case was not ripe for decision; but the observations of the Vice-Chancellor referred to by the Lord Justice laid down the general rule, which in other language will be found stated by Lord Justice *Lindley* in his work on Partnership. What Lord Justice *Lindley* says is this (3): "In all these cases it will be found"—those are cases in which the retired partner has been discharged—"that the Court or a jury has come to the conclusion that the creditor has in fact, either expressly or impliedly from his course of dealing with the continuing partners, adopted them as his sole debtors, and thereby in fact discharged the retired partner."

That lays down the law generally on both steps at once; but you must pass the first step in order to arrive at the second. Here I have to consider all the circumstances that occurred, including the conduct of the bank with reference to Mr. *William Rouse*, the retiring partner. That they had the liability of the new firm for the debt of the old firm is beyond question; that is not contested for a moment. The new firm undertook, not only as between themselves and the retired partner, but they undertook directly to the bank. The whole arrangements between the new firm and the bank were on that footing; and the bank were fully informed of what took place between the retiring partner and the three who were continuing the business, and the account proceeded from January, 1885, onwards, on the basis of the new firm being liable for the old debt. Therefore, I have no question here whatever as regards the first step. The question arises on the second step. [His Lordship then considered the evidence as to whether the bank had, by their course

(1) 18 L. T. (N.S.) 668; 16 W. R. 958. (2) 4 Hare, 32.
(3) 6th Ed. p. 254.

of action, released the Plaintiff from liability on his leaving the firm, and came to the conclusion that the bank did nothing to shew their intention of foregoing their rights against him. His Lordship then proceeded:—]

Therefore, upon the facts of the case, I find that the debtor, Mr. *William Rouse*, was not discharged, notwithstanding that the new firm adopted the debt, and that the bank treated them as creditors for the full amount. That is in reality not, strictly speaking, a question of fact, but a question of inference from the facts, to be determined by the application of settled principles of law.

I pass now to a much more difficult question, namely, whether Mr. *William Rouse* has been discharged, not by the taking of a new debtor, but by the application of the ordinary rule that giving time to a principal debtor releases the surety. Before considering that, I should have to come to the conclusion that there has been a giving of time. On that I have had the assistance of arguments on both sides, and certainly Mr. *Vernon Smith* put the question in a very cogent way, which is deserving of the very best attention. On the whole, my conclusion is that there was a giving of time. Perhaps some little confusion has been introduced by the use of the word "overdraft." Having regard to the complicated circumstances of the case, the term "overdraft" does not precisely mean what it usually means in dealings between banker and customer. It was not the overdraft of the new firm that was under consideration, but it was the power of drawing in excess of the difference between the sum to the credit of the new firm and the sum to the debit of the old account. With that explanation, the word "overdraft" does as well as any other word, although it is not quite its usual meaning. Now, let me examine what occurred on the 16th of February, 1889. [His Lordship then stated the circumstances attending the application for the increase of the overdraft from £50,000 to £3000 more, and proceeded:—]

What, then, is the result? That the firm were allowed to draw that sum of £3000, and it may be assumed that they did it; but that is immaterial, because the power to do it would be sufficient. Does that interfere with the right of the surety, assuming for this

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purpose that Mr. *Rouse* is to be regarded as surety? The law is stated precisely in the judgment in *Swire* v. *Redman* (1), which was prepared by Lord *Blackburn* and read by Lord Chief Justice *Cockburn*; and that judgment contains the following passage (2): "The relation of principal and surety gives to the surety certain rights. Amongst others the surety has a right at any time to apply to the creditor and pay him off, and then (on giving proper indemnity for costs) to sue the principal in the creditor's name." That is the right. Mr. *William Rouse*, therefore, being, as I hold him to be, a debtor to the firm in respect of the overdraft of £67,000 due in February, 1889, might have come to the bank and said, "I will pay you off that £67,000 now, and, on a proper indemnity for costs, I must have the right to sue the new firm in your name." He could not have obtained that from the bank unless the bank themselves were then in a position to sue. If they were not in a position to sue, it was because by some means or other they had bound themselves not to sue. If they had bound themselves not to sue, then, not being able to pass on the right to Mr. *William Rouse*, they had somehow or other to some extent prejudiced his position, and the doctrine under consideration, assuming Mr. *William Rouse* to be for all purposes surety, would apply.

The question, therefore, comes to this: Could the bank at any time after the 16th of February, 1889, and before the 14th of March, up to which time they granted the overdraft of £53,000, have sued the new firm? It seems to me they could not; and that, if before the *Judicature Act* they had sued, they would have been restrained in equity, and now the plea would hold either in one Division or the other. I do not wish to repeat myself; but what is the meaning of granting this overdraft for £53,000? That the new firm are entitled to draw in excess of the arrangement which they had entered into up to that time, and which I will assume was known to Mr. *William Rouse*, and to have been a fair one to him. Does it not come to this, "During that time we, the bank, are willing to treat you, the new firm, as our debtors in excess of the normal sum of £50,000, and, as such debtors, you are not to be called upon to pay that excess until

(1) 1 Q. B. D. 536. (2) 1 Q. B. D. 541.

after the 14th of March"? Surely, if a bank says to a customer, "You shall have £1000 to your credit until the 1st of March," say, 1894, he cannot, between to-day, say, the 7th of December, 1893, and the 1st of March, 1894, sue for any part of that sum. Let me put the point in a still more concrete form. The customer, in pursuance of that liberty given to him, draws a cheque for £500, part of the £1000, which puts his account immediately to a debit. Can the bank say, "By all means go on drawing cheques; we cannot avoid that up to the £1000, because we agreed to do that; but in the meantime we will sue you for that debit balance created by your overdraft to which we have assented." It seems to me that that is entirely inconsistent with the grant of the overdraft; that, though there is no express contract, it is necessarily implied from the contract; and that it would be inequitable and against conscience for the bank to sue, and such an action could not be maintained. If that be the right view of the position, there was an agreement to forbear during a short time—that is to say, between the 16th of February, 1889, and the 14th of March, 1889—which would have prevented the bank assigning their debt, as a debt upon which an action might be brought, to Mr. *William Rouse*, and his position has, therefore, been prejudiced. I take that case, not only because it is the first, but because it is much less complicated in its details than that of August, 1890, when the question of guarantee comes in. I am not sure that the guarantee by itself makes any difference, although it is an essential part of the transaction; but the general result is the same. The bank grants an overdraft to exist for a certain time, and the result is that they prejudice their right to sue, if my view be correct, and, therefore, debar themselves from making over the debt, as a debt on which an action could be brought, to Mr. *William Rouse*. Mr. *Vernon Smith's* argument is, that they were only dealing with the credit balance. The answer to that to my mind is, that the real credit balance, although the two accounts are separate and independent, is always ascertained by deducting the nominal credit balance from the old debt, and that, notwithstanding that one account is in credit, the amount of the old debt prevented there being any draft on that credit except to the allowed extent. Therefore, I

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think that time has been given to the new firm, and to that extent Mr. *William Rouse* has been prejudiced.

Is, then, Mr. *William Rouse* entitled to be treated to all intents and purposes as a surety, so as to apply the doctrine of release of the surety by giving time to the principal debtor? The difficulty is this: Mr. *William Rouse* was distinctly a surety to the new firm; and he was so with the knowledge and assent of the bank. It is proved that in April, 1885, if not earlier, the bank was fully acquainted with the position of the parties. They knew that the new firm had taken over the old business, that it had taken over the old liabilities, and with the liabilities also the assets; they knew that the new firm were to be thenceforward their debtors; they knew that Mr. *William Rouse* was to be, as between himself and the new firm, a surety only, that is to say, with all the rights as against the new firm which a surety has against the principal; but as between the bank and Mr. *William Rouse* he was a principal debtor. I have held that he was not discharged, and he seems to me to have been from the beginning, and to remain until the present time, a principal debtor to them. Therefore, unless it is true that the doctrine of releasing a surety applies where the debtor is a surety in fact, but not a surety as between himself and the creditor, he is not discharged.

Now, is that the law, or is it not? According to the case of *Oakeley* v. *Pasheller* (1) that is the law. *Oakeley* v. *Pasheller*, on one reading of it, decides that plainly; but, on another reading, it does not. It is scarcely material what my view of *Oakeley* v. *Pasheller* really is. I certainly, however, should conclude, from the language of the judgment, that in that case the creditor had assented to the position of surety by him who was, in the first instance, a principal debtor. That would certainly be my conclusion from the language; and, no doubt, if that were so, the judgment would go in the way in which it did go,—I might venture to say almost as a matter of course. That appears to be the view of Lord Justice *Lindley*, who refers to *Oakeley* v. *Pasheller* in that way in his work on Partnership. He says (2): "The true *ratio decidendi*, however, was that the plaintiff had accepted

(1) 4 Cl. & F. 207; 10 Bli. (N.S.) 548. (2) 6th Ed. p. 259.

B. and *C.* as his sole debtors." If I were at liberty to adopt the Lord Justice's conclusion on that case, coinciding with my own humble attempt to understand the judgment, I should, of course, decide in the bank's favour, if there were nothing more, and if there were no other law upon the subject. But the question has been discussed in other cases, and I have the judgment of Lord *Cairns* in a case in the House of Lords of *Overend, Gurney & Co.* v. *Oriental Financial Corporation* (1), where he is quite distinct as to the meaning of *Oakeley* v. *Pasheller* (2). Lord *Cairns* says this (3): "It appears to me that after the case which was referred to at the Bar, decided by your Lordships' House, of *Oakeley* v. *Pasheller*"—it is important to note that, because he refers to that case as binding everybody, including the House of Lords—"it is impossible to contend, if after a right of action accrues to a creditor against two or more persons, he is informed that one of them is a surety only, and after that he gives time to the principal debtor without the consent and knowledge of the surety, that under those circumstances the rule as to the discharge of the surety does not apply." The word Lord *Cairns* uses is "informed." It comes to this, that if a creditor at any time after entering into a contract with two persons, both of them principal debtors, is informed that as between those two principal debtors the one is surety only, and then he gives time to the other without the consent or knowledge of the surety, he releases the surety. That is the plain meaning of Lord *Cairns'* language, and he founds it on *Oakeley* v. *Pasheller*. I cannot do otherwise than treat that as a judicial enunciation of what *Oakeley* v. *Pasheller* decided.

But, further than that, I have the opinion of Lord Chancellor *Hatherley* in that very same case, when deciding it in the Court of Appeal in Chancery (4). After referring to the point that had been argued—namely, that *Overend, Gurney & Co.*, when they took the bills, believed the plaintiffs to be principals, and that the position of *Overend, Gurney & Co.* could not be altered by their being afterwards informed of the existence of a different arrangement, upon which point *Ex parte Graham* (5) was cited—

(1) Law Rep. 7 H. L. 348.
(2) 4 Cl. & F. 207; 10 Bli. (N.S.) 548.
(3) Law Rep. 7 H. L. 360.
(4) Ibid. 7 Ch. 142.
(5) 5 D. M. & G. 356.

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Lord *Hatherley* says this (1): "Now, in that case the Lords Justices asked if there was any authority to shew that knowledge acquired subsequently"—that is exactly equivalent to being "informed"—"to the engagement would fix upon the creditors the obligation of seeing to the interests of the surety; and counsel citing none, it seems to have been held that in that case the discharge did not take place. But *Oakeley* v. *Pasheller* (2) is a precise and direct authority upon the point, and being in the House of Lords is, of course, above that of this Court or that of the Lords Justices."

Therefore, I have Lord *Cairns'* opinion, confirmed, if I may say so, by an equally high authority, namely, that of the Lord Chancellor, deciding the same case in the Court of Chancery.

Now, as against that, and against what is said by Lord Justice *Lindley* in his work, I have the judgment of the Queen's Bench in *Swire* v. *Redman* (3). No doubt it is a judgment requiring very close and very respectful attention. It distinguishes between the two cases—that is, the case where the two debtors are both principals in the first instance, and the case where one of them is not the principal debtor in the first instance, but is a surety; and that judgment is directed to the point whether, in the former case—that is to say, where both debtors are principals in the first instance, but then one of them is converted into a surety simply by information or notice, or something of that kind—the doctrine applies; and that judgment certainly determines that it does not apply, and comments somewhat severely on *Oakeley* v. *Pasheller*, and cites a case in *Ireland* on the same point. But the Court came to a distinct conclusion that the well-known and well-settled principles of law are not applicable in such a case as that.

My notion, then, of the law as it stands on these authorities, although of course it is inconsistent with *Swire* v. *Redman*, is this—that, if you have two principal debtors, and then one of them is notified to the creditor as a surety, from that time forward the surety has the rights of a surety as against the creditor, and the creditor is bound to look after his interests to this extent—that he must not give time, and he must not otherwise prejudice the

(1) Law Rep. 7 Ch. 152. (2) 4 Cl. & F. 207; 10 Bli. (N.S.) 548.
(3) 1 Q. B. D. 536.

position of a surety except upon the terms of discharging him. I put it in that way, because it matters not in the least on this principle that the bank, in the present case, knew from the very first that, as between the two principal debtors, one of them, namely, Mr. *William Rouse*, was a surety. That does not affect my judgment in the slightest. The result would have followed just the same if, as a matter of fact, they had not known that Mr. *William Rouse* was a surety at that time, but had found out afterwards the arrangement between him and the gentlemen who continued the business. On that ground—not on the other —I must hold that Mr. *William Rouse* has been discharged, and, therefore, that now the bank have no right of action against him in respect of the debt of the old firm. The result, of course, is that, there being no debt, there is no lien on the shares as security for the debt that existed.

There will, accordingly, be a declaration that the Plaintiff is entitled to the fifty-five shares free from any lien or charge, and to payment of the arrears of dividend; also to an injunction to restrain the bank from selling or dealing with the shares; and the bank must pay the costs of the action. The counter-claim must be dismissed, with costs.

G. I. F. C.

C. A.

The bank appealed from this decision. The appeal came on for hearing on the 15th of January, 1894.

Finlay, Q.C., *Warmington*, Q.C., and *Vernon R. Smith*, for the Appellants:—

There are three questions: (1.) Did the Plaintiff become a surety? (2.) Had the bank notice of the fact? (3.) Was time given?

As to the first point, the Plaintiff unquestionably was originally a principal debtor, and we say that he never became a surety. On his retirement, the other partners covenanted to indemnify him, but that does not make him a surety. A contract of suretyship involves this, that one person has entered into a contract with the creditor for the purpose of guaranteeing the payment of a debt due from another person: *Swire* v. *Redman* (1).

(1) 1 Q. B. D. 536.

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[KAY, L.J.:—Why may not an arrangement between co-debtors that some of them only shall be liable make the others sureties?]

On principle, there must be a contract with the creditor that they shall only be sureties. In *Oakeley* v. *Pasheller* (1) the creditor agreed to accept the liability of the new firm, and there was a new contract by which the retiring partner was only a surety. The true view of that case is the one taken in *Swire* v. *Redman* (2), by *Blackburn*, J. See also *Maingay* v. *Lewis* (3). In *Overend, Gurney & Co.* v. *Oriental Financial Corporation* (4), the surety was a surety from the first, though the creditor did not know it. He was afterwards informed of it, and after receiving such information gave time to the principal. That is quite a different case from affecting the rights of a creditor by a bargain entered into between the co-debtors. *Oakeley* v. *Pasheller* can only be considered to decide that where an arrangement is entered into between co-debtors by which one of them is placed in the position of a surety and the creditor is a party assenting to such arrangement, then if he afterwards gives time to the others he loses his remedy against the one to whose being placed in the position of a surety he has assented; but it does not decide that if co-debtors make such an arrangement without the consent of the creditor, the creditor, after he has been informed of it, has only the same rights as if the supposed surety had been originally a surety. The doctrine of *Oakeley* v. *Pasheller* is not to be extended to a case like the present, even if it decided what the Respondents contend for: *Oakford* v. *European and American Steam Shipping Company* (5). [*Morrell* v. *Cowan* (6), and *Dane* v. *Mortgage Insurance Corporation* (7), were also referred to.] As to notice, the bank knew nothing about the arrangements between the parties, except what appeared in the notice of dissolution in the *Gazette*. It was contended below that there was novation; but there is nothing to shew that the bank intended to give up their right against any of the original debtors. The bank had a

(1) 4 Cl. & F. 207; 10 Bli. (N.S.) 548.
(2) 1 Q. B. D. 536.
(3) Ir. R. 5 C. L. 229.
(4) Law Rep. 7 H. L. 348.
(5) 1 H. & M. 182.
(6) 7 Ch. D. 151.
(7) [1894] 1 Q. B. 54.

right to allocate payments which were made by the new firm to the debt of the old firm: *In re Sherry* (1). The accounts of the old and new firms were kept distinct, and the bank never did anything to shew that they had accepted the new firm as their debtors in place of the old firm. The *onus* is on the Plaintiff to shew some agreement or conduct on the part of the bank releasing him from his liability: *David* v. *Ellice* (2). There is none here. If there was no novation, the liability of the Plaintiff remains as before the partnership. The bank had no knowledge of the terms of the deed of dissolution, and they never consented to treat the Plaintiff as surety only. The Plaintiff having been originally a principal debtor, he cannot get rid of his primary liability merely by informing the creditor that he has changed his position, as between himself and his joint debtors, by becoming a surety: *Swire* v. *Redman* (3).

Renshaw, Q.C., and *F. Thompson*, for the Plaintiff:—

The bank accepted the new partnership as their debtors; they treated the overdraft as a debt from the new firm. Every year they brought the debt and the interest into the balance-sheet, and treated the new firm as responsible for it. Also they proved for it in the bankruptcy of the new firm. There was therefore a novation in respect of the debt: *Thompson* v. *Percival* (4); *Lyth* v. *Ault* (5); *Ex parte Janson* (6); *Fergusson* v. *Fyffe* (7). But if there was no novation the effect of the deed of dissolution was to place the Plaintiff in the position of a surety only, and the fact that the bank gave time to the principal debtors released him. The bank knew the terms of the deed.

[*Warmington*, Q.C.:—We do not admit that the bank knew the terms of the deed.]

It was not disputed in the Court below, and the case was argued on that footing.

[LINDLEY, L.J., having consulted Mr. Justice *Kekewich*, said

(1) 25 Ch. D. 692.
(2) 5 B. & C. 196.
(3) 1 Q. B. D. 536.
(4) 5 B. & Ad. 925.
(5) 7 Ex. 669.
(6) 3 Madd. 229.
(7) 8 Cl. & F. 121.

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that he was informed by the learned Judge that, at the hearing before him, both parties agreed that the bank knew the terms of the deed of dissolution. The appeal must, therefore, be argued on the same understanding.]

That being so, the bank had notice that the Plaintiff was in the position of a surety only. If the Plaintiff had been a surety when the debt was originally contracted, it is established by the authorities that the bank would have been bound to treat him as such, although they did not know it at the time. It makes no difference that he was originally a principal debtor and changed his position afterwards, if the creditors had notice of it and did not object at the time: *Oakeley* v. *Pasheller* (1); *Overend, Gurney & Co.* v. *Oriental Financial Corporation* (2); *Burnett* v. *Lynch* (3); *Humble* v. *Langston* (4); *Moule* v. *Garrett* (5); *Bailey* v. *Edwards* (6); *Pooley* v. *Harradine* (7); *Fergusson* v. *Fyffe* (8); *Wilson* v. *Lloyd* (9); *Davies* v. *Stainbank* (10); *Greenough* v. *McClelland* (11). *Oakeley* v. *Pasheller* goes upon notice to the creditor, not on any fresh contract between him and the debtors. The way in which the bank dealt with the old debt is evidence of novation. The right of a bank to charge compound interest and commission depends on the continuance of the relation of banker and customer; it does not continue after the death of a customer, nor can it after his retirement, when he ceases to be a customer: *Williamson* v. *Williamson* (12). Here the bankers went on charging compound interest and commission on the old debt, which shews that they treated it as the debt of the new firm.

Warmington, in reply:—

There is no sufficient evidence of novation. A separate account was kept in respect of the old debt. The adding

(1) 4 Cl. & F. 207; 10 Bli. (N.S.) 548.
(2) Law Rep. 7 Ch. 142; 7 H. L. 348.
(3) 5 B. & C. 589.
(4) 7 M. & W. 517.
(5) Law Rep. 5 Ex. 132; 7 Ex. 101.
(6) 4 B. & S. 761.
(7) 7 E. & B. 431.
(8) 8 Cl. & F. 121.
(9) Law Rep. 16 Eq. 60.
(10) 6 D. M. & G. 679, 689, 691.
(11) 2 E. & E. 424.
(12) Law Rep. 7 Eq. 542.

compound interest and commission would have been wrong as against the Plaintiff; but it was right as against the continuing partners, and the account was between the bank and the new firm; so no intention to discharge the Plaintiff can be inferred from the way in which the old debt was dealt with. Proof against the estate of the continuing partners is no evidence of novation: *Harris* v. *Farwell* (1).

[LINDLEY, L.J.:—See and compare *Bilborough* v. *Holmes* (2).]

Apart from the question as to suretyship, there is nothing to shew that the bank intended to release the Plaintiff and accept the firm as their sole debtors, and no case has been cited which goes far enough to support the Respondents' view as to novation.

As to suretyship, the question is whether the present case comes within *Oakeley* v. *Pasheller* (3); and that involves the consideration what it was that was decided in that case. Lord *Hatherley*, in *Oriental Financial Corporation* v. *Overend, Gurney & Co.* (4), and Lord *Cairns* in the same case (5) treated it as deciding what Mr. Justice *Kekewich* has held it to decide; but we contend that the true view of it is that taken in *Swire* v. *Redman* (6); and that it went on the ground that the creditor was a party to the arrangement by which the outgoing partners became sureties only instead of principal debtors. If so, that case does not govern the present. It is shewn by *Oakford* v. *European and American Steam Shipping Company* (7), that the decision in *Oakeley* v. *Pasheller*, supposing it to amount to what the Respondent contends, is not to be pushed too far, and that case is closely analogous to the present. There is no case in which it has been held that a landlord's giving time to the assignee of a lease discharges the original lessee, though in that case there is a suretyship of the same kind as here. [*Baynton* v. *Morgan* (8) was referred to.]

Subsequently to the arguments above reported, the Court

(1) 15 Beav. 31.
(2) 5 Ch. D. 255.
(3) 4 Cl. & F. 207; 10 Bli. (N.S.) 548.
(4) Law Rep. 7 Ch. 142, 152.
(5) Ibid. 7 H. L. 348, 360.
(6) 1 Q. B. D. 536.
(7) 1 H. & M. 182.
(8) 22 Q. B. D. 74.

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desired further argument upon the question whether, by the terms of the covenant of indemnity and proviso in the dissolution deed of the 17th of April, 1885, the Plaintiff had not, in effect, himself authorized the continuing partners to make any necessary arrangements with the bank for the purpose of obtaining further time for payment of the old debt, and so had precluded himself from saying that, in his position of surety, he was discharged by time being afterwards given.

The appeal was accordingly restored to the paper, and came on for further argument on the above point on the 3rd of February, 1894.

Finlay, Q.C., *Warmington*, Q.C., and *Vernon R. Smith*, for the Appellants:—

The effect of the covenant and proviso is, that the Plaintiff authorized the continuing partners to make any arrangements with the bank and other creditors of the old firm for gaining time for payment of its debts. The arrangement under which, in February, 1889, time was given by the bank, was an arrangement so authorized; and therefore the Plaintiff does not come within the rule that a surety is discharged by time being given to the principal debtor, for the surety is discharged only where time is given without his consent. The proviso, which is in the usual form in such cases, clearly contemplates arrangements for gaining time, the object of it being to prevent the retiring partner going to creditors, paying them, taking transfers of their debts, and then suing the continuing partners: *Davidson's* Precedents (1). The meaning is that "unless I, *W. Rouse*, am called on to pay the debt for which I am liable, and so suffer loss thereby, I will not call upon you, the continuing partners, to pay." It would be transgressing the intention of the deed if the retiring partner could at once go to the creditors and pay them off, although they are not pressing for payment, and then sue the continuing partners.

Renshaw, Q.C., and *F. Thompson*, for the Plaintiff:—

The rights of the Plaintiff as surety are not taken away by

(1) Vol. ii. pt. i. 4th Ed. p. 453, n. (d.).

this proviso. The covenant is to pay "with all convenient speed," that is, "within a reasonable time"; and the proviso is not to be read as an authority to the continuing partners to arrange with creditors for time. The rights of a surety are to require the creditor to call on the principal debtor to pay; or, himself to pay the creditor, and then sue the principal debtor in his name: *Mercantile Law Amendment Act*, 1856 (19 & 20 Vict. c. 97), s. 5; *In re M'Myn* (1). And he is not deprived of these rights by this common-form proviso, the object of which is explained in *Davidson's* Precedents (2).

1894. Feb. 20. LINDLEY, L.J. (after stating the facts of the case in substantially the same terms as the statement above, proceeded):—

The only question, therefore, is whether the Plaintiff is still liable to the bank for the unpaid balance of the old debt. The Plaintiff contends that he is not, and that he has been discharged. First, he says that there has been a novation—*i.e.*, a substitution of debtors—and that the bank has agreed to look to the new firm alone for payment and to discharge him. Secondly, he says that, even if this be not so, he became in April, 1885, in the position or character of a surety only for the debt of the new firm, and that the bank knew this and discharged him by agreeing to give time to the new firm in February, 1889, and again in August, 1890, without consulting the Plaintiff and without reserving their rights against him. Mr. Justice *Kekewich* decided against the Plaintiff on the first point, but in his favour on the second. The learned Judge held that the case of *Oakeley* v. *Pasheller* (3), the better report being in *Bligh*, was conclusive on this last point. Both points having been again raised before us, it is necessary to allude to them.

First, as to novation. The question whether a creditor of two or more persons has released one of them and converted the others into his sole debtors by what is called novation is a question of intention, and an intention to look to them for

(1) 33 Ch. D. 575. (2) Vol. ii. pt. i. 2nd Ed. p. 475; 3rd Ed. p. 520.
(3) 4 Cl. & F. 207; 10 Bli. (N.S.) 548.

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payment, especially when requested to do so by their co-debtor, is quite consistent with an intention to look to them as a mere matter of convenience without releasing him. To succeed on this ground, what the Plaintiff has to prove is conduct inconsistent with a continuance of his liability, from which conduct an agreement to release him may be inferred. The last case on this point is *In re Head* (1); but it is unnecessary to cite authorities upon it. The bank had a lien on the Plaintiff's shares, and those shares were valuable. It does not, therefore, seem at all probable that the bank should intentionally give up this security, which would be the result of discharging the Plaintiff, unless care was taken to prevent such a result. Dealing with the new firm, and treating them as debtors and proving against their estate, is quite consistent with not releasing the Plaintiff. All the partners in the new firm were liable to the bank for the old debt, and in proving against their estate the bank was only doing its best to reduce the Plaintiff's liability. Such proof does not, as a matter of law, discharge the Plaintiff: see *Sleech's Case* (2), and *Harris* v. *Farwell* (3), where a new partner had come in. No doubt there are cases in which a creditor of a firm, one member of which has retired, has, by dealing with the continuing partners and by proving on their bankruptcy against them, shewn an intention to look to them alone, and has furnished evidence of an agreement to do so, *Hart* v. *Alexander* (4) and *Bilborough* v. *Holmes* (5) were cases of this sort. But in both of these cases new partners had come in. and in the last of them the proof was for money lent by the creditors to the new firm (6). Considering that in the present case the old debt was always kept separate and distinct, that no new partner became liable for it, that no new security was ever obtained for it, and that there is really nothing like proof of any intention to release the Plaintiff, as distinguished from an intention to obtain payment, if possible, from his co-debtors, I am of opinion that the Plaintiff fails to establish that he has been discharged by any agreement, express or implied, by the

(1) [1893] 3 Ch. 426.
(2) 1 Mer. 539.
(3) 15 Beav. 31.
(4) 2 M. & W. 484.
(5) 5 Ch. D. 255.
(6) See also *Brown* v. *Gordon*, 16 Beav. 302.

bank to look to the new firm, and to the new firm only, for the payment of the old debt.

I pass now to consider the more difficult question whether the bank discharged the Plaintiff by what took place in February, 1889. It must be taken that the bank knew of the nature of the arrangement come to between the plaintiff and his co-partners when he retired. Further, there can be no doubt, from the terms of the resolution of the 16th of February, 1889, and the letter of the 18th of February, 1889, that the bank agreed to give the new firm time to pay the old debt until the 14th of March, and that there was a sufficient consideration for this agreement to render it binding on the bank. Lastly, it is clear that the Plaintiff was not consulted in this matter, and that the bank did not reserve its rights against him. But it is urged by the bank that the terms of dissolution were such as to authorize the new partners to obtain time, if necessary, to pay the old debt, and that, therefore, even if the Plaintiff was in the position of a surety, he was not discharged by what was done. It was further contended that the Plaintiff's position always was that of a principal debtor primarily liable, and not that of a surety, and that he was not, therefore, discharged by the agreement to give time. One of the main objects, if not the primary object, of the deed of dissolution was to enable the continuing partners to carry on the business of the old firm, and so to pay off the Plaintiff; and, the better to enable them to do so, the Plaintiff expressly agreed not only to give them five years at least to pay him his capital, but also not to require them to discharge the liabilities of the old firm so long as he was not himself called upon to pay them. The proviso following the covenants to pay, and indemnify the Plaintiff against, the partnership debts, clearly, in my opinion, amounts to an agreement by the Plaintiff to the effect I have stated. Any other construction of the proviso would, I think, defeat the object which the parties had when they inserted the proviso in this deed. The object and provisions of this deed lead me to infer that the Plaintiff impliedly authorized his co-partners to make any arrangements with the creditors of the old firm which might be necessary to gain time for payment of its debts, provided, of

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course, that the pecuniary liability of the Plaintiff was not increased. The principal debt of the old firm was the debt due to the bank, and it was obvious to the Plaintiff, as well as to his co-partners, that, if the bank pressed for payment and could not be induced to give time, one of the main objects of the Plaintiff himself would be defeated. When, therefore, the continuing partners did induce the bank to agree to give them time for payment, they were only doing that which the Plaintiff had impliedly authorized; and when the bank agreed to give them time, the bank did nothing which was in any way inconsistent with the Plaintiff's rights under the deed, which, it is contended, put him in the position of a surety. The bank's conduct did not, therefore, discharge him. This view of the case was not presented to Mr. Justice *Kekewich*, and is not alluded to in his judgment. In my opinion, however, the above view of the dissolution deed is correct, and, if correct, it is conclusive against the Plaintiff. Indeed, I am of opinion that the mere agreement not to require payment of the partnership debts and liabilities by his co-partners would of itself prevent his discharge by a creditor who agreed to give them time. I cannot myself see how, in the face of such an agreement, giving time could discharge him. The express agreement necessarily involves an agreement not to call upon the principal creditor to require payment of his debt, but the ground on which a surety is discharged by an agreement to give time is that he is deprived of this right without his consent. See *per* Lord *Hatherley* in *Oriental Financial Corporation* v. *Overend, Gurney, & Co.* (1). If he has himself agreed not to exercise this right this reasoning is inapplicable. It is urged that the surety might himself pay off the principal debt and then sue the debtor, and reliance was placed on the *Mercantile Law Amendment Act* (19 & 20 Vict. c. 97), s. 5. But if the surety were to do this before he was himself required to pay he would, in my opinion, be acting contrary to the agreement expressed in the proviso I am considering. It may be said that if the principal creditor agreed to give the debtor time he could still sue the surety, who would then have a right to require the

(1) Law Rep. 7 Ch. 150-151.

creditor to sue the principal debtor. But it would be a gross breach of faith on the part of the creditor, and, in truth, a breach of his agreement with the debtor, if the creditor were to sue the surety and put him in motion against the debtor until the expiration of the indulgence agreed to be given him; and there is ample authority for saying that this cannot be done. Lord *Hatherley*, in *Oriental Financial Corporation* v. *Overend, Gurney & Co.* (1), expressly said: "If you agree with the principal to give him time, it is contrary to that agreement that you should sue the surety, because if you sue the surety you immediately turn him upon the principal, and therefore your act breaks the agreement into which you have entered with the principal." Statements of the law to the same effect will be found in the judgments in *Davies* v. *Stainbank* (2). No case has yet decided that a surety has been discharged by an agreement by the principal creditor to give time to the debtor, where the surety had himself agreed not to require the debtor to relieve him until he was himself sued, and, for the reasons I have given, the law does not go that length. But, be this as it may, the dissolution deed in this case contains other clauses which, with the proviso, remove whatever doubt there might be if the proviso stood alone, or were in a deed framed to carry out other objects.

It was strenuously argued before us that this case was concluded in favour of the Plaintiff by *Oakeley* v. *Pasheller* (3). But the foregoing observations, if well founded, take this case out of the rule established, or supposed to be established, in that case, and render it wholly inapplicable to the present. In *Oakeley* v. *Pasheller*, *Sherard* and *Reid* were partners. *Sherard* died. *Reid* took in a new partner, *Kynaston*; and it was then agreed between *Sherard's* executors and *Reid* and *Kynaston* that *Reid* and *Kynaston* should continue the business, take over the assets, and indemnify *Sherard's* estate from the partnership debts and liabilities. These included a liability for £10,000 to *Oakeley*, who held joint and several bonds for that amount, given by *Sherard* and *Reid*, and which were not then due. *Oakeley* was

(1) Law Rep. 7 Ch. 150. (2) 6 D. M. & G. 689, 696.
(3) 4 Cl. & F. 207; 10 Bli. (N.S.) 548.

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father-in-law to both *Reid* and *Kynaston*, and *Oakeley's* son was one of their clerks. It is clear that *Oakeley* knew all about the arrangement between them and *Sherard's* executors. For years *Reid* and *Kynaston* paid *Oakeley* interest on his debt of £10,000, and he clearly looked to them for payment of the principal. The new firm contracted a new debt to him, and the old and new debts were blended together in its accounts with him. Moreover, on several occasions he gave them time to pay the old debt, and, on one occasion in particular, in 1817, he agreed to give them three years time. The old debt was also referred to in the correspondence between him and the new firm as a loan to it. On one occasion (in 1823) when *Oakeley* required further security, he, at the request of *Reid* and *Kynaston*, deliberately abstained from communicating with *Sherard's* executors for fear they should enforce their indemnity against the new firm. *Reid* afterwards died, and his estate was insufficient to pay his debts. Shortly afterwards *Oakeley* assigned *Sherard's* bonds to trustees, and, *Oakeley* having himself died, these bonds were sought to be enforced against *Sherard's* estate. This led to a suit by his executors to restrain proceedings on the bonds, and the Master of the Rolls, in the first instance, and Lord *Brougham* on appeal, and, finally, Lord *Lyndhurst* and Lord *Cottenham* in the House of Lords, decided that *Sherard's* estate had been discharged by the agreement to give time in 1817, and an injunction was granted accordingly. *Oakeley's* knowledge and conduct clearly warranted the inference, not only that he knew of the arrangement come to between *Sherard's* executors and the new firm, but that, knowing such arrangement, he himself acceded to it, and consented to treat *Reid* and *Kynaston* as his principal debtors, and *Sherard's* executors as sureties only. Of course, if this were the view taken of the facts, the decision would present no difficulty, for it would be quite obvious that, by agreeing to give three years time to *Reid* and *Kynaston*, *Sherard's* executors would be discharged.

This view of the decision is, I confess, the view I should myself adopt; but it is undeniable that *Oakeley* v. *Pasheller* (1) has been regarded as going a step further, and as deciding that

(1) 4 Cl. & F. 207; 10 Bli. (N.S.) 548.

knowledge only on the part of the creditor of the arrangement come to between his own debtors is enough to compel the creditor to recognise such arrangement, and to prevent him from dealing with them regardless of it. This was clearly the view taken of *Oakeley* v. *Pasheller* (1) by Vice-Chancellor *Wood* in *Oakford* v. *European and American Steam Shipping Company* (2); by Lord *Cairns* in *Overend, Gurney & Co.* v. *Oriental Financial Corporation* (3); and by a majority of the Judges in the Irish Court of Exchequer Chamber in *Maingay* v. *Lewis* (4). In *Oakford* v. *European and American Steam Shipping Company* Vice-Chancellor *Wood* declined to extend *Oakeley* v. *Pasheller*, but nevertheless said that it determined "that where a creditor had two joint principal debtors, and was entitled, if he found it convenient, to give time to the one and to press the other, an agreement between the debtors might so affect him as to deprive him of that right. That was a strong decision, and it went upon the footing that the creditor having notice of the agreement was bound to regard it." It cannot, I think, be denied that the view there taken of *Oakeley* v. *Pasheller*, whether rightly or not, has led to decisions which now, at all events, have resulted in establishing the proposition above stated. In *Swire* v. *Redman* (5) it is true that the Court of Queen's Bench did not adopt the same view of *Oakeley* v. *Pasheller* as that taken by other Judges in the cases to which I have referred, and the Court deliberately refused to hold that a creditor of several persons primarily liable to him as principals was not at liberty to deal with them as such simply by being informed that since their obligation to him had been contracted they had agreed amongst themselves that one of them should be indemnified by the others. But, after the decision of the House of Lords in *Overend, Gurney & Co.* v. *Oriental Financial Corporation* (6), the decision in *Swire* v. *Redman* cannot, I think, be supported upon the grounds on which it was mainly rested. The implied authority, however, given by the retired partners to the continuing

(1) 4 Cl. & F. 207; 10 Bli. (N.S.) 548.
(2) 1 H. & M. 190.
(3) Law Rep. 7 H. L. 360.
(4) Ir. R. 5 C. L. 229.
(5) 1 Q. B. D. 536.
(6) Law Rep. 7 H. L. 348.

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partners to carry on business in the way in which he and they had been in the habit of carrying it on was sufficient to support the decision in that case, as, indeed, the Court itself pointed out at the end of their judgment. Notwithstanding the reasoning of the Court in *Swire* v. *Redman* (1), and which I should adopt and follow if I were free to do so, I am driven to the conclusion that now, at all events, the law has come to be what Vice-Chancellor *Wood* and Lord *Cairns* said it had been decided to be in *Oakeley* v. *Pasheller* (2). I have already stated Vice-Chancellor *Wood's* view. Lord *Cairns* said (3) that, after that case, "it is impossible to contend, if after a right of action accrues to a creditor against two or more persons, he is informed that one of them is a surety only, and after that he gives time to the principal debtor without the consent and knowledge of the surety, that under those circumstances the rule as to the discharge of the surety does not apply." Notwithstanding *Swire* v. *Redman*, I find it impossible to draw any satisfactory distinction between the case of a debtor primarily liable and afterwards becoming in the position of a surety, with the knowledge of the creditor, and the case of a person who is a surety, and who makes himself primarily liable to a creditor, who does not know that his debtor is a surety, but is afterwards informed of that fact. The House of Lords having decided that the rule as to the discharge of a surety applies to the last case, I am unable to hold that it does not apply to the first, and, in truth, the Lords decided that it applied to the second case, because, in their view, it had already been decided to apply to the first.

I have been induced to make these observations on *Oakeley* v. *Pasheller* because the present case was argued as if it turned on what was there really decided, and because this was the view taken by Mr. Justice *Kekewich*, and the correctness of his view of that case was impeached before us. But, for the reasons given in the earlier part of this judgment, the rule supposed to have been there laid down, and which, however it originated, I take to be now law, is inapplicable to the present case. The terms of the dissolution deed exclude the application of the rule in

(1) 1 Q. B. D. 536. (2) 4 Cl. & F. 207; 10 Bli. (N.S.) 548.
(3) Law Rep. 7 H. L. 360.

question. In my judgment, the bank has not discharged the Plaintiff, and is still entitled to the lien which it claims on his shares. The appeal, therefore, must be allowed. Judgment must be given for the Defendants, both on the claim and on the counter-claim, and it must be declared that they are entitled to the lien they claim on the fifty-five shares of the Plaintiff. If an account is wanted of what is due to the bank in respect of its lien, liberty to apply in Chambers for such an account must be reserved; but the Plaintiff, being in the wrong, must pay the costs here and below.

KAY, L.J.:—

William Rouse was partner with three other persons in a firm of worsted spinners at *Bradford*, carrying on business as *Wm. Rouse & Co.* On the 31st of December, 1884, the partnership came to an end by effluxion of time, and on the 17th of April, 1885, a deed of dissolution was executed, by which *Wm. Rouse* agreed to leave his capital of £2669 in the business to be thenceforward carried on by his three co-partners, and assigned to them all his share in the assets, and they covenanted with him to pay all the debts of the firm, and to indemnify *Wm. Rouse* against them, and to repay to him his capital on the 1st of July then next, with interest at 5 per cent., with a proviso that if the interest were regularly paid he would not call it in for five years.

At the date of this deed the members of the late firm were jointly and severally indebted under a deed of covenant dated the 9th of May, 1878, to the *Bradford Banking Company* in a sum of upwards of £55,000, since reduced to £34,269 15*s.* 8*d.* *Wm. Rouse* held fifty-five shares in the bank. They had a lien on these shares for his debt to them. He claims his dividend on the shares. The bank assert their lien. To this *W. Rouse* replies that he was, by the deed of dissolution, put as between himself and his co-partners in the position of a surety, and that the bank had full knowledge of this, and afterwards gave time to the new firm, and so discharged him. Also, he contends that there was a novation of the debt.

It was said in opening the appeal that there was no evidence of the bank's knowledge of the deed of dissolution. In the

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judgment of the learned Judge this fact is treated as being known to them, and counsel for *W. Rouse* state that this was admitted in the argument in the Court below. In this state of things we have communicated with the learned Judge, who confirms this statement, and we must therefore deal with the case on the footing that the bank had full knowledge of the deed of dissolution and of the relative positions of the parties to it before the transaction which is relied on as a contract to give time to the new firm.

On the 16th of February, 1889, the bank agreed with the new firm to allow them an overdraft of £53,046, which included the old debt, until the 14th of March, the firm undertaking to wind up the manufacturing department of their business, which would release about £15,000 capital, and to seek a reduction of certain mortgages upon the mill property to other persons. This was confirmed by a resolution of that date at a meeting at which one of the firm was present.

Other subsequent transactions were also relied on; but it seems to me not necessary to refer to them, because I think this was a binding agreement for consideration not to enforce payment of the £53,046 before the 14th of March. The effect upon *William Rouse* was that he could not before that time exercise his right of requiring the creditor to enforce payment by the principal debtor, nor if in the meantime he had paid to the bank the amount could he have sued the principal debtors in the name of the bank until after the 14th of March. There was, therefore, that alteration in his position which *primâ facie* would discharge him. But this would not interfere with his right of suing upon the covenant by his former partners to indemnify him which was contained in the deed of dissolution. Does this make any difference? I think that question is answered by *Oakeley* v. *Pasheller* (1). This is the authority upon which the learned Judge in the Court below has founded his decision, and it is necessary to examine it carefully. Two persons, *George Reid* and *Philip Castel Sherard*, were partners in a firm of *George Reid & Co.* They became indebted for £10,000 to Sir *Charles Oakeley*, who held their joint and several bonds for

(1) 10 Bli. (N.S.) 548.

the amount. *Sherard* died. *Reid* carried on the business for himself and *Sherard's* executors until the end of the partnership term. The determination of the partnership by effluxion of time was gazetted, and *Reid* then took a partner named *Kynaston*, who was a son-in-law of Sir *C. Oakeley*. On the 8th of June, 1815, a deed was executed between *Reid*, the executors of *Sherard* and *Kynaston*, by which in effect *Reid* and *Kynaston* purchased all the executors' interest in the business for a large sum, of which a small part was to be paid and the rest secured, and they covenanted to give a bond in £150,000 to indemnify the executors against the debts of the concern, which included the £10,000 due to Sir *C. Oakeley*. In 1817 an arrangement was made, under which Sir *C. Oakeley* was to take an interest in the new firm, and he at the same time engaged not to call upon them for their debt to him of £10,000 for three years. The Master of the Rolls, Sir *J. Leach*, in 1832, held that this discharged the estate of *Sherard*, saying this (1): "In 1817 Sir *C. Oakeley* enters into an agreement with the two persons who had become, as between themselves and the estate of *Sherard*, the principal debtors; he enters into an arrangement with them to give three years' time for the payment of the demand, and I am of the opinion, to be collected from what I have already stated, that Sir *C. Oakeley* could not either proceed within these three years against the principal debtor or against the surety in respect of that demand, and if he could not proceed against either of them in respect of that demand, then the surety is released; and the surety is released for this reason; because whatever the surety pays, he has a right to call on the principal debtor to repay the sum which he has so advanced; but if there be a delay for three years he may be extremely prejudiced by that delay, because in the interim the solvent principal debtor may become an insolvent principal debtor, and then by the act of the creditor the surety would have lost his remedy against the principal debtor. I am therefore of opinion," continued the Master of the Rolls, "that the giving the time for three years in 1817 did discharge the estate of *Philip Castel Sherard*: I consider it did discharge him, being of opinion that Sir *C. Oakeley*

(1) 10 Bli. (N.S.) 577.

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well knew in 1817 that by the arrangement between the two partners, *Reid* and *Kynaston*, they had become the principal debtors, and *Sherard's* estate surety only."

This decree was affirmed by Lord Chancellor *Brougham*, but his judgment we have not been able to obtain. It was then appealed to the House of Lords, and was there again affirmed by Lord Chancellor *Cottenham* and Lord *Lyndhurst*. During the argument Lord *Lyndhurst* asked (1): "How will an arrangement between debtors affect a creditor, unless he adopts it? Can the parties alter their situation with respect to the creditor without his assent?" The argument answers this, first, by saying that notice of the new arrangement is enough, and that, having that notice, he is bound so to conduct himself as not to affect the surety. This argument seems to have been accepted, for in giving judgment Lord *Lyndhurst* stated that an arrangement was made between Sir *C. Oakeley* and *Kynaston* without any communication with the executors of *Sherard* to extend the time of payment for a period of three years, and the question was what was the effect of that extension, whether it discharged the representatives of *Sherard*, and his Lordship continued (2): "Now, in consequence of an arrangement which took place between the representatives and the new partnership, they stood in the character of sureties, and the principle of law is this, that where a creditor gives time to the principal, there being a surety, without any communication with the surety, and without the consent of the surety, it discharges him from liability, because it places him in a new situation, and exposes him to risk and contingencies which he would not otherwise be liable to. That being the fact in the present instance, and as the facts bring home the knowledge of all the circumstances of the transaction to Sir *C. Oakeley*, it is my opinion, in this case, that the representatives of *Sherard* were discharged from their liability."

The circumstance that the executors had a covenant of indemnity upon which they might have sued *Reid* and *Kynaston* directly without using Sir *C. Oakeley's* name was not treated as altering the application of this law.

The case seems also to decide that where persons who are

(1) 10 Bli. (N.S.) 586. (2) 10 Bli. (N.S.) 590.

jointly and severally liable to a creditor all being originally in the position of principal debtors, by a subsequent arrangement provide as between themselves that some of them shall take the burden of the debt and indemnify the others against it, this arrangement puts the debtors who are to be indemnified in the position of sureties as between themselves and their co-debtors. It further decides apparently, that if this alteration of the position of his debtors *inter se* becomes known to the creditor, and he thereafter gives time to the debtors who have assumed the position of principal debtors, this will discharge those who have become sureties. On this last point, however, a serious difference of opinion has been intimated by distinguished Judges. It seems to be founded upon the question asked by Lord *Lyndhurst* during the argument in the House of Lords which I have already quoted. Can the debtors alter their position with respect to the creditor without his assent? Must it not be shewn that he adopts the arrangement between them? Unquestionably no assent by the creditor is wanted to render valid an arrangement among the debtors that some of them shall pay the debt and indemnify the others against it. It would be absurd to say that joint debtors cannot make such an arrangement among themselves without the assent of the creditor. But what is meant is that the creditor may disregard the arrangement unless he not only knows it, but also agrees to be bound by it. That is, unless he so agrees, he may alter the position of a debtor who, as he knows, is a surety, by giving time to the other debtors without discharging him. But when he agrees to give time he may reserve his rights against the surety, and then the surety will not be discharged: *per* Lord *Eldon, Ex parte Glendinning* (1); *Owen* v. *Homan* (2). The only additional burden thrown on the creditor is the necessity of not dealing separately with the principal debtor so as to injure the surety without expressly declaring that he does not release him. Such a reservation, when giving time to the debtor, would mean that the creditor engages not to sue within the time so given unless compelled to do so by the surety.

It was always the law that if the creditor knew that the debtors to him were as between themselves in the position of principal

(1) Buck, 517. (2) 4 H. L. C. 997, 1037.

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debtor and surety, whether he knew this at the time when the debt was contracted or discovered it afterwards, that knowledge obliged him not to deal with the principal debtor alone so as to prejudice the surety. Lord *Cottenham*, in *Hollier* v. *Eyre* (1840) (1), expressly says: "Although all the grantors were principals as between them and the grantees, yet as between themselves some of them might be sureties for others; and if it was established that such was the case as between the Plaintiff and *Lynch*, and that the grantees knew that such was the case, they might by their dealing with *Lynch*" (the principal debtor) "have raised an equity in favour of" the surety, and he proceeds to say that to affect the creditor with this equity he must have that notice at the date of the transaction by which the position of the surety is altered.

Can it be the law that if by a subsequent agreement one of the principal debtors becomes a surety, and this is made known to the creditor, he may disregard it? The difference between that case and the creditor discovering after the debt was contracted that one of the debtors was at the time of contracting the debt as between himself and his co-debtors only a surety seems to me inappreciable. It is only the knowledge by the creditor of the surety's position which affects him in that case; and why it should not equally affect him in the other I confess I cannot comprehend.

In *Ex parte Graham* (1854) (2) the indorsee for value of a bill of exchange had notice after the indorsement to him that it had been accepted for the accommodation of the drawer, and after this notice he joined the other creditors of the drawer in a composition of arrangement, and released the drawer. Subsequently he sought to prove against the acceptors, who had become bankrupt. Lord Justice *Knight Bruce* asked if the question was not unaffected by decision. Counsel seem to have thought it was. *Oakeley* v. *Pasheller* (3) was not cited. The proof was allowed.

In *Oakford* v. *European and American Steam Shipping Company* (1863) (4) Vice-Chancellor *Wood* said of *Oakeley* v. *Pasheller*: "That case determined that where a creditor had two joint

(1) 9 Cl. & F. 1, 45.
(2) 5 D. M. & G. 356.
(3) 4 Cl. & F. 207; 10 Bli. (N.S.) 548.
(4) 1 H. & M. 182, 190.

principal debtors, and was entitled, if he found it convenient, to give time to the one and to press the other, an agreement between the debtors might so affect him as to deprive him of that right. That was a strong decision, and it went upon the footing that the creditor having notice of the agreement was bound to regard it."

In *Oriental Financial Corporation* v. *Overend, Gurney & Co.* (1871) (1), bills of exchange were discounted by the defendants. They were afterwards informed that the acceptors were merely accommodation acceptors, and with that knowledge they bound themselves to give time to Mr. *Henry*, the principal debtor. Lord Chancellor *Hatherley* referred to *Ex parte Graham* (2), and to the inquiry made in that case whether there was any authority on the subject, and pointed out that *Oakeley* v. *Pasheller* (3) was "a precise and direct authority upon the point"; and his Lordship proceeds to say that there is no hardship in the case, because when giving time the creditors ought to reserve their rights against the surety. The case was appealed to the House of Lords (4), and Lord Chancellor *Cairns* says this (5): "It was said that the knowledge that the *Financial Corporation* was surety was not obtained by *Overend, Gurney & Co.* until after the bills became due; and inasmuch as the contract arising out of and connected with the bills was made before *Overend, Gurney & Co.* had any knowledge of that suretyship, their rights and their powers of proceeding under that contract ought not to be interfered with in consequence of knowledge subsequently obtained. My Lords," the Lord Chancellor continued, "it appears to me that after the case which was referred to at the Bar, decided by your Lordships' House, that of *Oakeley* v. *Pasheller*, it is impossible to contend, if after a right of action accrues to a creditor against two or more persons, he is informed that one of them is a surety only, and after that he gives time to the principal debtor without the consent and knowledge of the surety, that under those circumstances the rule as to the discharge of the surety does not apply."

(1) Law Rep. 7 Ch. 142.
(2) 5 D. M. & G. 356.
(3) 4 Cl. & F. 207; 10 Bli. (N.S.) 548.
(4) Law Rep. 7 H. L. 348.
(5) Law Rep. 7 H. L. 360.

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It is clear that Lord *Hatherley* and Lord *Cairns* understood *Oakeley* v. *Pasheller* (1) to have decided that the mere knowledge of the creditor that one of his debtors has become surety as between him and the other obliges the creditor not to deal with the principal debtor alone so as to prejudice the surety. Both those learned Judges treat this as the law whether the debtors were originally in that position and the creditor was afterwards informed of it, or whether by a subsequent arrangement between themselves they were put into that position and the creditor was informed of the change.

We have obtained the cases and appendix of *Oakeley* v. *Pasheller* before the House of Lords; and I find it stated in the appellant's case that Sir *Charles Oakeley* was unaware of the arrangement for the indemnity of *Sherard's* executors, and that when he gave time in 1817 he reserved his rights against the estate of *Sherard.* The respondent's case states that the arrangement in 1817 was not known to the executors of *Sherard.* The appendix contains no evidence of any reservation of rights against *Sherard's* executors, or of any agreement between them and Sir *Charles Oakeley* to treat them as sureties only.

In *Maingay* v. *Lewis* (2) the question came before the Court of Exchequer in *Ireland,* and the case of *Oakeley* v. *Pasheller* was carefully considered. *Pigot,* C.B., *Lawson,* J., *Morris,* J., and *Monahan,* C.J., held that giving time to a principal debtor discharged a surety who had become such by an arrangement between himself and the other debtor after the debt was contracted, if the creditor was aware of this change of their relative positions before he gave time to the principal debtor. All these Judges treated *Oakeley* v. *Pasheller* as having decided the point. *Lawson,* J., states the argument against the doctrine (3), and follows the House of Lords decision substantially. *Deasy,* B., and *Keogh,* J., differ because in the case before them they consider time was not given. *Fitzgerald,* B., is the only Judge who doubts the effect of the case in the House of Lords. He considers that the ground of the decision was the giving time to *Kynaston,* the new partner, to whom the deceased partner's estate was always, he says, in the position of surety.

(1) 4 Cl. & F. 207; 10 Bli. (N.S) 548. (2) Ir. R. 5 C. L. 229.
(3) Ir. R. 5 C. L. 231.

In this state of the authorities the question came before the Court of Queen's Bench upon an equitable plea in the case of *Suire* v. *Redman* (1876) (1), which in its facts was identical with what I understand to have been the facts in *Oakeley* v. *Pasheller* (2). There were two principal debtors, *Redman* and *Holt*, who were partners. The partnership expired, and by arrangement between them *Holt* assumed the position of principal debtor, and *Redman* that of surety. The creditors were informed of this, and, after receiving that information, gave time to *Holt*. On an application for a new trial, *Bramwell*, B., having ruled that *Redman* was not discharged, Lord Chief Justice *Cockburn* read the judgment of Lord *Blackburn*. The judgment was to this effect: If a creditor has two debtors, one of whom is not surety for the other, or, if he is, the creditor is ignorant of the fact, he may give time to either without discharging the other. But if from the beginning one is principal and the other surety, the case is different. "And if the creditor binds himself not to sue the principal debtor, for however short a time, he does interfere with the surety's theoretical right to sue in his name during such period. . . . Though this doctrine," continued the learned Judge, "seems . . . . consistent neither with justice nor common sense" (and see observations by the same learned Judge in *Petty* v. *Cooke* (3)), "it has been long so firmly established that it can only be altered by the Legislature. And as it depends on the supposed inequity of interfering with the rights which the surety has as between him and the principal debtor, it is not material that the knowledge on the part of the creditor that the surety was from the beginning such, and therefore had such rights, was not acquired till after the surety had become liable to the creditor: *Pooley* v. *Harradine* (4), *Greenough* v. *McClelland* (5), and *Oriental Financial Corporation* v. *Overend, Gurney & Co.* (6). This rule, whether it was originally right or not, is no doubt well established. But when, as in the present case, the two debtors are both principals, there is no such right. *Redman* never could

(1) 1 Q. B. D. 536, 541.
(2) 4 Cl. & F. 207; 10 Bli. (N S.) 548.
(3) Law Rep. 6 Q. B. 790.
(4) 7 E. & B. 431.
(5) 2 E. & E. 424.
(6) Law Rep. 7 Ch. 142.

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have paid off the plaintiffs and sued *Holt* in their name, for by the very act of paying off the plaintiffs the cause of action in their name would be gone" (but see, in the case of a surety, 19 & 20 Vict. c. 97, s. 5), "and the right which *Redman* would have had to sue *Holt* for contribution would be in no way affected by any bargain which the plaintiffs had made with *Holt* alone to give him further time. The contention is that the two, *Redman* and *Holt*, had a right, without the knowledge or consent of the plaintiffs, to create a new state of things, and then, by giving notice, to prevent the plaintiffs from doing what they lawfully might before —to create a right in themselves, which, if observed, must derogate from the plaintiffs' right, and then to say that is inequitable in the plaintiffs to act in derogation of this right so created. Surely the inequity begins earlier, and is in the defendants' derogating from the plaintiffs' right without their consent."

The judgment then deals with *Oakeley* v. *Pasheller* (1), which the learned Judges refuse to understand in the manner in which it was understood by Lord *Hatherley* and Lord *Cairns*; but they construe it to mean that the new arrangement by which *Sherard's* executors became sureties was an arrangement to which the creditor, Sir *Charles Oakeley*, was a party, made between him and the two partners in the new firm, of whom one, *Kynaston*, was his son-in-law. That is, that Sir *Charles Oakeley* not merely knew of this arrangement, but that he engaged to be bound by it.

There is nothing in the facts of the case as stated, nor in the language of the judgments which I have read, to justify this construction of the decision in *Oakeley* v. *Pasheller*. Lord *Hatherley* and Lord *Cairns* did not so understand it. The question involved in the case was an equitable one, and the opinion of the two Lord Chancellors as to the effect of that decision must have more weight than that of the two learned Judges who decided *Swire* v. *Redman* (2).

The report of *Overend, Gurney & Co.* v. *Oriental Financial Corporation* (3) in the House of Lords does not seem to have been before their Lordships, and Lord *Cairns'* construction of that decision is not referred to by them.

(1) 10 Bli. (N.S.) 548. (2) 1 Q. B. D. 536.
(3) Law Rep. 7 H. L. 348.

Moreover, the value of the decision in *Swire* v. *Redman* (1) seems to me, if I may say so with all respect, greatly affected by the fact that it is based upon the view that the doctrine of the discharge of a surety by giving time to the principal debtor is "consistent neither with justice nor common sense." It was long ago adopted by Courts of Common Law. In the language of *Tindal*, C.J., in *Combe* v. *Woolf* (1832) (2), "Except where a surety has entered into a bond for payment in default of the principal debtor, Courts of Law, as well as Courts of Equity, have always held the surety to be discharged where, without his assent, time has been given to the principal debtor. Where the surety has entered into such a bond, and by a parol agreement time has been given to the principal debtor, the surety is compelled to resort to a Court of Equity because by the rules of law a parol agreement cannot be pleaded in discharge of an instrument under seal."

Moreover, the doctrine has again and again been recognised and affirmed in the House of Lords: see, amongst other cases, *Hearn* v. *Cole* (3); *Bank of Ireland* v. *Beresford* (4); *Torrance* v. *Bank of British North America* (5); *MacTaggart* v. *Watson* (6); *Creighton* v. *Rankin* (7); *Owen* v. *Homan* (8).

A criticism of *Oakeley* v. *Pasheller* (9), which shews so strong a desire not to follow that decision if it be possible to escape from it, must be received with some hesitation. For myself, I am bound to say that the decision in *Oakeley* v. *Pasheller*, fairly read, seems to admit of but one meaning, that which was put upon it by Lord Chancellor *Hatherley* and Lord Chancellor *Cairns*—namely, that the information to the creditor of a subsequent arrangement, by which his co-debtors became as between themselves in the position of principal and surety, puts him under the obligation not to deal with the principal debtor so as to prejudice the surety, just as would be the case if the debtors were originally in that position *inter se*, and the creditor discovered it afterwards.

(1) 1 Q. B. D. 536.
(2) 8 Bing. 156, 161.
(3) 1 Dow. 459.
(4) 6 Dow. 233, 238.
(5) Law Rep. 5 P. C. 246.
(6) 3 Cl. & F. 525.
(7) 7 Cl. & F. 325.
(8) 4 H. L. C. 997.
(9) 4 Cl. & F. 207; 10 Bli. (N.S.) 548.

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Then it was argued that there was a novation of the debt, by which the continuing partners were accepted as the sole debtors, and *William Rouse* was released. Such a release must be by a contract with *William Rouse*, expressed or implied. There was no express contract to release him; the argument is that such a contract must be implied from the circumstances of the case. The principal facts relied on to raise this implication are, that, although the bank kept a separate account of the old debt, they charged in that account compound interest, and that, as they must be taken to know that they could not make this charge against *William Rouse* after they had, by his withdrawal from the business, ceased to act as bankers for him, that fact shews that they treated the continuing partners as alone liable. Moreover, the bank dealt with them only in respect of the debt, and after their bankruptcy the bank proved against their joint estate and received a dividend of 10*s*. in the pound, which, it is argued, they could not have done if they had not released *William Rouse*.

But this is not a case in which any new partner, not originally liable for the debt, has been treated as liable; all these dealings were with the original joint debtors, or some of them. It is clear that the mere treating the continuing firm as liable, and proving against their estate, is not necessarily inconsistent with preserving the right against the retired partner: *Harris* v. *Farwell* (1). That joint estate was really the estate which the retired partner made over all his interest in, when he retired; and, upon the whole, though with some hesitation, I do not think there is sufficient evidence of an intention to release *William Rouse* to enable us to decide in his favour on this ground.

But if the true result be that the bank did not intend to release *William Rouse*, I cannot help feeling great reluctance to come to the conclusion that he has been released in effect by the inadvertence of giving time to his co-debtors, without reserving the rights of the bank against him.

Lord Justice *Lindley* has called attention to the form of the deed of dissolution, and we have heard a further argument upon the question whether, by that deed, *William Rouse* did not

(1) 15 Beav. 31.

empower his co-partners to make an arrangement for further time without his concurrence, or without discharging him by so doing. The creditor was not a party to this deed, and it cannot be read as giving to him any rights against the surety. The deed contains a covenant by *William Rouse's* former partners to pay the debts of the old firm as soon as they conveniently can, and to indemnify and keep indemnified *William Rouse* against them, and this covenant is qualified by a proviso worded thus: "Provided always, and it is hereby agreed and declared, that the said *William Rouse*, his executors and administrators, shall not be entitled to require payment of any of the said debts or sums of money hereinbefore covenanted to be paid by the said *J. F. Rouse*, *F. Rouse*, and *H. Rouse*, so long as the said *William Rouse*, his heirs, executors, and administrators, shall be indemnified according to the covenant last hereinbefore contained."

The rights of a surety which are taken away by an agreement not to sue the principal debtor for a certain time are principally these—namely, first, his right to call upon the creditor to compel the principal debtor to pay, for which purpose he might institute a suit in equity; or, secondly, his right to pay the creditor and then to sue the principal debtor in his name: see *Mercantile Law Amendment Act* (19 & 20 Vict. c. 97), s. 5. The proviso in question does seem to give up the first of these rights so long as *William Rouse* is indemnified "according to the covenants." But if the principal debtors do not pay the debt as soon as they conveniently can, they do not fulfil their covenant, and if they arrange with the creditor not to pay for a certain time, when they could conveniently pay within that time, it seems to me that the proviso would not prevent the surety from using all the remedies in his power. To the second right of the surety which I have mentioned, that of voluntarily discharging the debt and then calling on the principal debtor to repay the amount, the proviso does not in terms apply at all. It is a common form found in *Davidson's* Precedents (1). It is there explained by a note thus: "A proviso to this effect should always be inserted, unless it be intended that the covenantor should immediately pay the debts. For where a person sold an estate which was

(1) Vol. ii. pt. i. 2nd Ed. p. 475.

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charged with annuities, but which he was not personally liable to pay, and took a covenant from the purchaser to pay the annuities, and indemnify the vendor against them, it was held, that the vendor could sustain an action for non-payment of the annuities without shewing that he had been damnified by the non-payment."

The object, then, of this proviso is to prevent this use being made of the covenant to pay the debt and indemnify the surety. It is not intended to deprive the surety of any other of his rights as between him and the creditor, or as between him and the principal debtor.

I cannot find anything else in the deed which has that effect. When dealing with debts due to the firm there is an express agreement that, with respect to these, *William Rouse* "will allow and confirm whatsoever" his partners or their executors, administrators, or assigns shall lawfully do or cause to be done. But there is no like provision as to debts due from the firm. The deed follows in all respects the form given in *Davidson's* Precedents; and if it be held that this deed authorizes the grantees to arrange with the creditor for time, it must follow that in every case of a deed of dissolution in the ordinary form this must be the result.

The doctrine that arrangements between the creditor and principal debtor which prejudice the surety have the effect of releasing him is founded in the jealous care which Courts of Equity and Courts of Law have always taken of a surety's interest. The principle is thoroughly settled. I am not inclined to depart from it or to question its reasonableness, if authority permitted. Authority seems to me decisive against this; and, on the whole, I think that the decision in this case should be affirmed.

A. L. SMITH, L.J.:—

It is not disputed in this case that, unless the Plaintiff can establish that the Defendants have released him from a debt of some £34,000, which at one time he undoubtedly owed to the Defendants, they are entitled to the lien they set up in the present action. The way in which the Plaintiff seeks to establish that he is no longer a debtor to the Defendants is by setting up

that they have accepted the liability of a firm which succeeded the Plaintiff in business in accord and satisfaction of the Plaintiff's debt to them; or in the alternative, that, upon the authority of *Oakeley* v. *Pasheller* (1), he is discharged by reason of the Defendants having given time to the new firm by binding contract, for which firm, to the knowledge of the Defendants, the Plaintiff had become surety.

I have nothing to say upon the first point—viz., the accord and satisfaction, or, as it is called, a release by novation—excepting that I agree that the judgment of Mr. Justice *Kekewich* should be upheld as to this, for the reasons given by him and the Lords Justices who have preceded me.

I desire, however, to say something upon the second point, which undoubtedly, as matters stand, is one of great difficulty.

It has long since been established that, if a creditor contracts with a principal debtor and a surety, and afterwards by a binding contract with the principal debtor he gives time to him without the consent and knowledge of the surety and without reserving his rights against the surety, the surety is discharged.

Different reasons, given by different Judges, for this will be found in the books; but I apprehend that the main reason is that a surety is entitled at any time to require the creditor to call upon the principal debtor to pay off the debt, or himself to pay off the debt, and that when he has paid it off he is at once entitled in the creditor's name to sue the principal debtor; and if the creditor has bound himself to give time to the principal debtor, the surety cannot do either the one or the other of these things until the time so given has elapsed, and it is said that by reason of this the surety's position is altered to his detriment without his assent.

It was decided in the year 1857, by the Court of Queen's Bench, in *Pooley* v. *Harradine* (2), that, although upon the face of a document (a promissory note) two persons had contracted with a creditor as principal debtors, yet if one of them, when he so contracted, was in truth only a surety for the other, and the creditor, at the time he took the document, knew this to be so, the creditor could not afterwards give time to the one who was

(1) 4 Cl. & F. 207; 10 Bli. (N.S.) 548. (2) 7 E. & B. 431.

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in reality the principal without releasing the other, who was in reality the surety. It was held that, inasmuch as the relationship of principal and surety in fact existed to the knowledge of the creditor, between the persons contracting with him, though they contracted as principals, an equity arose which compelled the creditor thereafter to treat the one as a surety, which in truth he then was, and not to give time to the principal debtor without the consent of the surety.

It is true that the creditor could sue the surety upon his contract as principal debtor, and that this was not altered; but it is impossible to say, as it was argued before us, that the creditor's position was not altered by the introduction of the equity. Before its introduction the creditor could have dealt with either of his debtors as he liked; after its introduction he could not, for if he gave time to the one, who was in fact the principal debtor, he discharged the other, who was in fact the surety, unless he reserved his rights against him. The Court in this case forbore from deciding whether this equity would have arisen if the creditor did not know of the position of surety at the time when he contracted.

It is too late to discuss the ground for, or the validity of, the equity, for in the case of *Overend, Gurney & Co.* v. *Oriental Financial Corporation* (1), where the relationship of principal and surety existed when the creditor contracted with his debtors as principal debtors, the House of Lords held it to exist, and decided that it applied even if notice of the relationship of principal and surety was not conveyed to the creditor until after the contract was made. In this case it was held that a surety was discharged where the creditor believed he was contracting, and did in fact contract, with two as principal debtors, if after the contract was made the creditor became aware, as the truth was, that he had only contracted with persons who stood in the relationship of principal and surety *inter se*, and that he could not afterwards give time to the one who was the principal debtor without discharging the surety.

It appears to me that the equity which was applied in *Pooley* v. *Harradine* (2) was applied in the latter case with the addition

(1) Law Rep. 7 H. L. 348. (2) 7 E. & B. 431.

that notice of the true state of facts would suffice if given after the contract was made between the creditor and his debtors, which last point the Court of Queen's Bench had abstained from deciding.

It will be seen that in these two cases, *Pooley* v. *Harradine* (1) and *Overend, Gurney & Co.* v. *Oriental Financial Corporation* (2), the Court gave effect as far as possible to what in truth was the real position *inter se* of the persons when they contracted with the creditor, and applied thereto the rule as to the discharge of the surety by giving time to the principal debtor. As I have said before, it is too late to quarrel with this equity.

But it was said on behalf of the Plaintiff, that as long ago as the year 1832, in the case of *Oakeley* v. *Pasheller* (3), the Court had gone further, and had held that where a creditor contracts with two who are *de facto* principal debtors *inter se*, they, without the knowledge or assent of the creditor, can afterwards create *inter se* the position of principal debtor and surety, and that the creditor, although no party to such arrangement, upon having notice of it, is compelled to recognise this new-made position of principal and surety; and that if the creditor, after such notice, gives time to the principal debtor without the consent or knowledge of the thus created surety, this surety is discharged.

I cannot myself see in such a case where any equity comes in.

If the Court by the application of an equity is to give effect, as it did in the two cases above mentioned, to what in truth was the real relationship of the persons *inter se* when they contracted with the creditor, why, if an equity exists, should it not do the like in the present case?

Agreeing as I do, from the cases above mentioned, that it has been held that an equity exists to compel the creditor to give effect to what was the real relationship of the parties *inter se* at the time they contracted with the creditor, when that relationship became known to him, why, I ask, should an equity arise for the purpose of giving effect to what was not the real relationship of the parties *inter se* when the contract was made with the creditor?

(1) 7 E. & B. 431.
(2) Law Rep. 7 H. L. 348.
(3) 4 Cl. & F. 207; 10 Bli. (N.S.) 548.

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The real position of the persons *inter se* when they contracted with the creditor in the present case was that of principals *inter se*, and if an equity is to be applied so as to give effect to this true relationship of these persons, it should, as it appears to me, give effect to what the relationship in reality was, which was that of two principal debtors *inter se*, and not that of principal and surety.

I can understand its application when the creditor is unfortunate enough to have only a contract with two who, when he contracted, were *inter se* principal and surety; but I cannot understand its application when the creditor has a contract with two who, when he contracted with them, were *inter se* in fact two principal debtors.

This is a difficulty I have in this case, and which I have not been able to overcome.

No reasons at the Bar have been given why there should be such an equity as is contended for; all that is said is that there is such an equity, because the House of Lords, in *Oakeley* v. *Pasheller* (1), has decided that it existed, and that two most eminent Judges have since said that it was so decided. If it has been so decided by the House of Lords, of course there is an end of the matter; but whether it has appears to me to be one great question in this case.

Before turning to *Oakeley* v. *Pasheller*, I should point out that in the year 1876 this exact point came up for actual decision in the Queen's Bench Division in the case of *Swire* v. *Redman* (2), when it was held that two principal debtors could not change their positions *inter se* to that of principal and surety, so as to affect their creditor without his assent, and that *Oakeley* v. *Pasheller* had not decided that they could. *Bramwell*, B., had held at Nisi Prius that the point taken was untenable. The Queen's Bench Division, in a considered judgment which was prepared by the then Mr. Justice *Blackburn*, upheld Baron *Bramwell's* ruling.

I cannot myself read this judgment without feeling its force and good sense.

This judgment must be erroneous if the House of Lords in

(1) 4 Cl. & F. 207; 10 Bli. (N.S.) 548. (2) 1 Q. B. D. 536.

Oakeley v. *Pasheller* (1) has decided what the Plaintiff says it has, a view which Mr. Justice *Kekewich* has ratified.

Now, I agree that in *Oakeley* v. *Pasheller* it was decided that where two partners were originally principal debtors to a creditor, and the partnership was dissolved, and one partner went out and the other having taken in a new partner, continued the business, and both gave an indemnity to the partner who went out that in such a case the one who went out became only secondarily liable; or, in other words, a surety to both the continuing and the new partner.

This decides one point taken by Mr. *Finlay* for the Defendants against him, for he argued that the Plaintiff in this case never became a surety at all. It also, in my judgment, decided that, in the circumstances of that case, the old partner *Sherard* (it was in reality the executors of the old partner, but this is immaterial), had become surety to Sir *C. Oakeley*, who had advanced money to the old firm, and that Sir *Charles*, by giving time as regards the old debt to the principal debtors—*i.e.*, the new firm—had discharged him.

But what were the circumstances of that case? In my judgment, it is impossible to read the prolix statement of facts set out (1) without seeing that there existed ample evidence from which to hold that Sir *Charles Oakeley* not only had notice, but actually agreed to the whole arrangement which was come to by his two sons-in-law, *Reid* and *Kynaston*—viz., the substitution of *Kynaston* for *Sherard* as principal debtor with *Reid* to Sir *Charles* for the old debt, and the constituting the old partner *Sherard* a surety for *Reid* and *Kynaston* to Sir *Charles Oakeley*.

The taking in of the new partner, *Kynaston*, was good consideration for such agreement. It seems to me immaterial whether it is called an "agreement," or, as are used in the case, an "acceptance," or "an adoption," or "an assent" by Sir *Charles*, if there was good consideration for his agreeing to what had been arranged by the principal debtors between themselves.

Towards the end of the argument of the case in the House of Lords (2), Lord *Lyndhurst* is reported in 4 Cl. & F. to have put the point. He says: "Can you cite any authority to the effect

(1) 4 Cl. & F. 207; 10 Bli. (N.S.) 548. (2) 4 Cl. & F. 232.

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that two original principal debtors could, by arrangement among themselves, convert one into a surety only for the other principal debtor?"

In 10 Bli. N.S., Lord *Lyndhurst's* question is reported thus (1): "How will an arrangement between debtors affect a creditor, unless he adopts it? Can the parties alter their situation with respect to the creditor without his assent? Can you cite any authority to shew that joint debtors, by their own act, can alter their situation after the contract has been concluded?" Mr. *Pemberton*, who was arguing for *Sherard's* executors, could not do so. What he said in answer to Lord *Lyndhurst* was this. He said (2): "The letters and accounts, and all the circumstances of this case, make it quite clear that Sir *Charles Oakeley* accepted *Reid* and *Kynaston* as principal debtors, looking to *Sherard's* executors as sureties."

It appears to me from this question that Lord *Lyndhurst* did not at the time consider that mere notice of the arrangement come to by the partners *inter se* would bind Sir *Charles*. The words he apparently used were "adopt" and "assent."

Mr. *Pemberton*, so far as the report goes, appears to have satisfied Lord *Lyndhurst* by the answer he gave, that Sir *Charles Oakeley* either "adopted" or "accepted" or "assented" to the new position, for, shortly after these remarks, Lord *Lyndhurst*, finding that a new partner had been introduced, delivered a short judgment, holding that *Sherard's* executors had been discharged under the circumstances which existed in the case.

That there was good consideration for this to Sir *Charles Oakeley*, as I have before said, is clear, viz., the liability of the new partner *Kynaston*. With all deference to those who have thought, and still think, that this judgment decides the point it is said to do, I cannot bring myself to so hold. What in my judgment it does decide is, that where two have contracted with a creditor as principal debtors, and were then principal debtors *inter se*, and afterwards by agreement for consideration between themselves and their creditor one of the principal debtors is to be a surety and the other principal debtor, then the creditor must treat them as in that position, though he has a contract with them as

(1) 10 Bli. (N.S.) 586. (2) 4 Cl. & F. 232.

principals and cannot afterwards give time to the principal debtor without discharging the surety.

It will be noticed that in the case of *Overend, Gurney & Co.* v. *Oriental Financial Corporation* (1) the House of Lords was dealing with a case in which the parties contracting with the creditor were originally principal debtor and surety *inter se*; they had not to consider, and, as it appears to me, they did not consider the point as to what would be the case if the two had been originally principal debtors *inter se*. And, as before stated, the equity which was then applied was that the Court would give effect to the true position of the principal debtors *inter se* when the contract was made, even though the creditors did not have notice of this position till after it was made.

It is true that Lord *Cairns*, in delivering judgment in this case, did use words which would lead to the conclusion that he thought that the equity now contended for existed, for he said (2): "It is impossible to contend, if after a right of action accrues to a creditor against two or more persons, he is informed that one of them is surety only, and after that he gives time to the principal debtor without the consent and knowledge of the surety, that under those circumstances the rule as to the discharge of the surety does not apply." These remarks, it must be remembered, were made by Lord *Cairns* when he was dealing with a case in which the persons contracting with the creditor were always from the first in the position of principal and surety *inter se*, and not of two original principal debtors. It is also true that in 1863 Lord *Hatherley*, when Vice-Chancellor *Page Wood*, in *Oakford* v. *European and American Steam Shipping Company* (3), where he was dealing with a case in which the debtors were originally principal debtors *inter se*, had said of *Oakeley* v. *Pasheller* (4) as follows: "In order to sustain the plaintiff's contention, it would be necessary to give a very large extension to the doctrine of *Oakeley* v. *Pasheller*. That case determined that where a creditor had two joint principal debtors, and was entitled, if he found it convenient, to give time to the one and to press the other, an agreement between the debtors might so affect him as

(1) Law Rep. 7 H. L. 348.
(2) Ibid. 360.
(3) 1 H. & M. 190.
(4) 4 Cl. & F. 207; 10 Bli. (N.S.) 548.

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to deprive him of that right. That was a strong decision; and it went upon the footing that the creditor having notice of the agreement was bound to regard it." This language, I own, leads to the inference that the Vice-Chancellor understood that the equity now contended for by the Plaintiff existed in the case of original principal debtors *inter se*; but the learned Judge gave no reasons for its application excepting that it had been so decided in *Oakeley* v. *Pasheller* (1).

The Irish case of *Maingay* v. *Lewis* (2) exemplifies what different views can be taken of what was decided by the House of Lords in *Oakeley* v. *Pasheller*.

In the present case there is no evidence, nor is it suggested that the bank agreed to treat or "adopted" or "accepted" or assented to the plaintiff becoming a surety; all that is alleged is, that it had notice that the Plaintiff had left the firm and that the old partners had given him the indemnity which they did. It appears to me that there is no authority actually binding upon me which would compel me to hold that the equity now contended for by the Plaintiff existed in a case like the present, and, if I were forced to decide the point, I should hold that, as was held in *Swire* v. *Redman* (3), there was no such equity. It is not, however, necessary for me to decide this question, for I am of opinion, for the reasons given at length by Lord Justice *Lindley*, that, by the contract between the Plaintiff and his old partners contained in the deed of dissolution, this case is not governed by *Oakeley* v. *Pasheller*, nor by the equity which the Plaintiff contends for, even if it exists, and that consequently he is not discharged from the debt of £34,000 due from him to the Defendants by reason of their having given time as they did to the new firm by a binding contract. For these reasons, in my opinion, this appeal should be allowed and judgment entered for the Defendants, with costs here and below.

Solicitors: *Patersons, Snow, Bloxam, & Kinder*, agents for *Gardiner & Jeffery, Bradford; Field, Roscoe & Co.*, agents for *Taylor, Jeffery & Jessop, Bradford.*

(1) 4 Cl. & F. 207; 10 Bli. (N.S.) 548.

(2) Ir. R. 3 C. L. 495; and on appeal in Ir. R. 5 C. L. 229.

(3) 1 Q. B. D. 536.

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March 1.

In re FISH.
INGHAM *v.* RAYNER.

[1893 I. 66.]

Will—Construction—Niece—Grandniece of Wife—Illegitimacy—Extrinsic Evidence.

A testator gave his residuary estate to his "niece *E. W.*" Neither he nor his wife had any niece; but his wife had a legitimate grandniece and an illegitimate grandniece both named *E. W.* The illegitimate grandniece tendered evidence to shew that she was the person indicated by the testator:—

Held (affirming the decision of the Vice-Chancellor of the Palatine Court of *Lancaster*), that the illegitimate grandniece could not come into competition with the legitimate grandniece, and therefore there was no latent ambiguity and no extrinsic evidence could be admitted.

THIS was an appeal from a decision of the Vice-Chancellor of the County Palatine of *Lancaster.*

George Fish, by his will dated the 12th of January, 1884, gave the ultimate residue of his real and personal estate after the death of his wife to his "niece *Eliza Waterhouse* during her life." The testator died on the 2nd of June, 1884, and his wife died in March, 1893.

The testator had no niece named *Eliza Waterhouse*; but his wife had a legitimate grandniece named *Eliza Waterhouse,* and also an illegitimate grandniece of the same name.

An originating petition was filed by the surviving executor to take the opinion of the Court on the question to whom the residuary estate of the testator belonged.

The illegitimate grandniece, *Eliza Waterhouse,* married *John Rayner* in November 1886. In support of her claim she tendered evidence that she was the person intended by the description of the testator's "niece *Eliza Waterhouse.*"

The Vice-Chancellor, Mr. *Robinson,* Q.C., refused to admit the evidence and decided that *Eliza Waterhouse,* the legitimate grandniece, was entitled to the residuary estate.

Eliza Rayner appealed from this decision.

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Upjohn, for the Appellant:—

If the testator had had a niece of his own named *Eliza Waterhouse*, we admit that no evidence could have been given by a more distant relative in competition with her. But here there is no person who answers the description in the will and therefore some evidence is absolutely necessary to shew whether there are any persons who claim under the secondary meaning of the word niece; and when it is ascertained that there are more than one, why should they be debarred from tending evidence as to which of them was meant? There is in fact a latent ambiguity, which justifies the reception of evidence to explain it. The evidence which we tender is not evidence of the intention of the testator, but of the surrounding circumstances to assist the Court in construing the will. We only desire to put the Court in the same position as the testator: *Charter* v. *Charter* (1); *In the Goods of Ashton* (2); *Doe* v. *Hiscocks* (3); *Sherratt* v. *Mountford* (4); *Grant* v. *Grant* (5).

Macnaghten, for *Eliza Waterhouse*:—

It being ascertained that neither the testator nor his wife had a niece, but that his wife had a legitimate grandniece named *Eliza Waterhouse*, she is the person who most nearly answers the description in the will, and there is no latent ambiguity, and no extrinsic evidence can be admitted. An illegitimate relative cannot come into competition with a legitimate relative of the same degree: *Dorin* v. *Dorin* (6); *In re Taylor* (7); *Wells* v. *Wells* (8); *In re Brown* (9).

Mansfield, for the executor.

Upjohn, in reply.

LINDLEY, L.J.:—

This is one of those painful cases in which it is probable that the testator's intention will be defeated, but the rule of law is

(1) Law Rep. 7 H. L. 364.
(2) [1892] P. 83.
(3) 5 M. & W. 363.
(4) Law Rep. 8 Ch. 928.
(5) Law Rep. 2 P. & M. 8.
(6) Ibid. 7 H. L. 568.
(7) 34 Ch. D. 255.
(8) Law Rep. 18 Eq. 504.
(9) 37 W. R. 472.

too strong for the Appellant. I think the Vice-Chancellor was right in refusing to admit the evidence that was tendered. The testator gave his residuary estate to his "niece *Eliza Waterhouse.*" There was no person accurately answering to that description. Neither the testator nor his wife had any niece; but his wife had two grandnieces, named *Eliza Waterhouse*, of whom one was legitimate and the other was illegitimate. We are asked to admit evidence in favour of the illegitimate grandniece, who is in competition with the legitimate one, who but for her would be undoubtedly entitled. I think it would be contrary to the authorities to do so. The principle applicable cannot be stated more satisfactorily than by *Mellish*, L.J., in *Sherratt* v. *Mountford* (1), where he says, "No doubt a man's own nephews and nieces are primarily his nephews and nieces, but I am of opinion that his wife's nephews and nieces are his nephews and nieces according to the ordinary meaning of the words in a secondary sense"; I have here to say that there are cases in which great nephews and great nieces have been let in under the description of nephews and nieces; then he goes on, "so that if he has no nephews or nieces according to the strict primary sense, then his wife's nephews and nieces will take under the description of his nephews and nieces, unless there is some other class of persons who come into competition with them, and who are proved by extrinsic evidence first to be persons who may take under the description of nephews and nieces, and if that is proved, then that they are the persons who really were intended to take." I think this applies to the case before us, where the person most nearly answering the description is the legitimate grandniece of the testator's wife, and that no evidence can be admitted to prove that her illegitimate grandniece was intended. In my opinion the Vice-Chancellor was right, and the appeal must be dismissed.

KAY, L.J.:—

I am of the same opinion. This is really an attempt to bring in evidence of what the testator intended under the guise of evidence of the surrounding circumstances. The testator had

(1) Law Rep. 8 Ch. 928, 931.

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no niece, nor had his wife one; but his wife had a legitimate grandniece. Therefore there was a person who would be clearly entitled, if there had been no other claimant. But it is ingeniously contended that when once the fact was ascertained that the testator had no niece, there was a latent ambiguity which enabled the Court to let in evidence of this kind—that the illegitimate grandniece was living in the house of the testator and was sometimes called by him his niece. And this was called evidence of the surrounding circumstances. Suppose in a case where there was no question of illegitimacy, a testator left a legacy to his son *John*, and suppose he had a son named *John* who had been living away from him, and there was another person named *John* living with him who was not his son, but whom he called his son, in such a case would any evidence be admitted that his son *John* was not the person intended to be benefited? How can the fact of a testator being in the habit of calling a person his son who is not his son be evidence of surrounding circumstances? It is really evidence of the intention of the testator, to prove that he meant some one else and not the person designated in the will. Does it make any difference that in this case the testator had no niece, and that there was only a grandniece of his wife named *Eliza Waterhouse*? An attempt is made to oust her by introducing an illegitimate grandniece, and this case is therefore stronger than the one I put, because it is the rule of law that a legitimate relation is always to be preferred to an illegitimate one. I need only refer to *Hill* v. *Crook* (1) and *Dorin* v. *Dorin* (2). For this reason also the application fails. I am therefore of opinion that the Vice-Chancellor was right, and the appeal must be dismissed.

A. L. SMITH, L.J.:—

I have come to a decided conclusion that the evidence offered ought not to be admitted. If we could have admitted it, I confess that I should have gladly done so, but we are precluded by authority. The testator gave his residue to his "niece *Eliza Waterhouse*." Neither he nor his wife had a niece, but his wife had two grandnieces of that name, one of whom was legitimate

(1) Law Rep. 6 H. L. 265. (2) Law Rep. 7 H. L. 568.

and the other illegitimate. These two ladies are in competition, and the question is whether the illegitimate grandniece can give evidence that she is the person intended by the testator, and not the legitimate one. In my opinion the rule of law is well established. *Primâ facie* a gift to a testator's niece refers to his legitimate niece, and supposing the only person who could take under the gift was a grandniece of the testator's wife, that means a legitimate grandniece of his wife and not an illegitimate grandniece of his wife. That being so, there is no latent ambiguity. If both had been legitimate, there would have been a latent ambiguity; but inasmuch as one is legitimate and the other is not, there is none. Therefore the Vice-Chancellor was right in rejecting the evidence, and the appeal must be dismissed.

Solicitors: *Philpots*, agent for *E. Rennison, Blackburn; Pritchard, Englefield & Co.*, agents for *Ellis D. Little, Blackburn; J. W. Shaw, Blackburn.*

M. W.

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Feb. 10, 16, 17.

In re PICKARD.
ELMSLEY *v.* MITCHELL.

[1893 P. 1516.]

Mortmain—Mortmain Act (9 *Geo.* 2, *c.* 36), *s.* 3—*Corporation Debenture Stock —Charge on Rents.*

Corporation debenture stock charged on "the revenue of all landed and other property of the corporation":—

Held, not to be an interest in land within the *Mortmain Act* (9 Geo. 2, c. 36), s. 3.

THIS was an originating summons to determine certain questions arising under the will of *Andrew Pickard*, who died in September, 1890, and the will of his sister *Hannah Pickard*, who died in June, 1891. *Hannah Pickard* bequeathed and appointed her residue for the benefit of certain charitable institutions which had not power to hold land. Part of her residue consisted of corporation bonds over which she had a power of appointment under the will of her brother *Andrew Pickard*. One of the questions raised was whether £800 *Leeds* Corporation Debenture 4 per cent. Stock and £20,000 *Leeds* Corporation Debenture 3½ per cent. Stock was pure or impure personal estate.

The debenture stock in question was issued in 1888 in pursuance of sect. 67 of the *Leeds Improvement Act*, 1877, which authorized the creation of such stock, and provided that "the stock so created and issued shall be a charge upon the borough fund, borough rate, the waterworks and gasworks undertakings, and the improvement rates, and the revenues of all landed and other property vested in or belonging to the corporation respectively derived therefrom, and any other revenue which may be acquired by them, but such stock shall be distributable, transmissible, and transferable as and in other respects have the incidents of personal estate."

Certificates of the stock were issued under the seal of the corporation with conditions of issue indorsed thereon, one of which was, "the security for the stock and the due payment of the interest thereon is the borough fund, the borough rate, the waterworks

and gas undertakings, the improvement rate, and the revenues respectively derived therefrom, and from all landed and other property vested in or belonging to the corporation, and any other revenue which may be acquired by them. A further security for the redemption of the stock is a sinking fund which is established and invested under Government supervision."

Swinfen Eady, Q.C., and *Peterson*, for the Plaintiffs.

Cozens-Hardy, Q.C., and *Warrington*, for the charities:—

The debenture stock-holders have no direct remedy against any land the corporation have, if there be any land capable of being charged by the corporation. They can only come on the borough fund, which is regulated by the *Municipal Corporations Act*, 1882 (45 & 46 Vict. c. 50), ss. 139, 140: *In re Thompson* (1); *In re Yerbury's Estate* (2); *In re Parker* (3).

H. M. Humphry, for some of the next of kin of the testatrix:—

The case is not governed by *In re Thompson*. The stock certificates which follow the words of charge in the *Leeds Improvement Act* enable the stock-holders by a receiver to go behind the borough fund and intercept the rents of real estate of the corporation before they get into the borough fund. Their charge is therefore an interest in land within the *Mortmain Act*: *Brook* v. *Badley* (4); *In re Holmes* (5).

S. Hall, Q.C., and *Baker*, for other parties.

Cozens-Hardy, in reply.

NORTH, J. (after referring to sect. 67 of the *Leeds Improvement Act*, and the conditions indorsed on the stock certificate, continued):—

Now the question is, what is charged by that? The first argument addressed to me is that it is the borough fund, and nothing else. Looking at the words again, the first thing

(1) 45 Ch. D. 161.
(2) 62 L. T. (N.S.) 55.
(3) [1891] 1 Ch. 682.
(4) Law Rep. 3 Ch. 672.
(5) 60 L. J. (Ch.) 267.

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mentioned is the borough fund; and if it were intended to charge the borough fund, and nothing else, why should the section not stop there? I think it clear that the words were intended to apply to something which is not part of the borough fund, because they go on to charge the borough rate, the waterworks and gasworks undertakings, and the improvement rate and the revenues respectively derived therefrom—those are things which are not part of the borough fund—and then proceed, "and from all landed and other property vested in or belonging to the corporation." Now, that property certainly is not part of the borough fund, and the revenue derived from it is not part of the borough fund. It may ultimately become part of the borough fund; but that seems to me to be a different thing from saying that it is part of the borough fund referred to at the commencement of this string of words, when revenue derived from landed and other property is separately mentioned afterwards.

It is said that the case of *In re Thompson* (1) is in point here, and makes it necessary that I should hold that as the revenues of the land and other property of the corporation are to go into the borough fund, therefore that case applies. But this seems to me to be a question of construction, depending upon the language of the debenture I have before me: and the conclusion I come to in this case is that I cannot say that all these revenues are pure personalty because they are part of the borough fund. I think it would be putting too strained a construction upon these words to do so; and I do not know why, after first mentioning the borough fund, and afterwards passing away to rates, and so on; and then passing on to revenues of land, the section should be taken never to have gone beyond what it began with, and to have described unnecessarily in detail what were merely constituents of the borough fund, and as such included in the first words used in the section. I am not satisfied that the construction of these words is what Mr. *Cozens-Hardy* contends, and I do not think that the case of *In re Thompson* binds me to come to this conclusion.

There is, then, a charge on something beyond the borough fund. What is it? It is on the revenues derived from the

(1) 45 Ch. D. 161.

landed and other property. That seems to me to be a very different thing from a charge upon the property itself. It is a charge only upon the revenues to be derived from it; and that charge, if it is enforced directly against the corporation, can only be enforced against them in respect of sums received and carried to the borough fund.

Then it is suggested that a receiver may be appointed of the rents; and, by virtue of this charge, the rents may be arrested before they ever become part of the borough fund. Assuming that to be so, still I do not think that it makes the charge a charge upon land. It clearly is not a charge upon land as distinguished from the revenues of the land, because it is expressly confined to the revenues of the land; and that can only be enforced against the land at the utmost by the appointment of a receiver; and that receiver can do nothing but collect the revenues of the land after they have become arrears. He cannot anticipate growing payments of rent. He can only ask for the rent, or what other payments there may be, after they are due; and it is settled that arrears of rent are not property which is so much connected with land that it cannot be given for charitable purposes. Supposing that a receiver is appointed, he cannot do anything but receive the revenues of the land when they are paid, and can only enforce payment by seizing the chattels on the land; and, in my opinion, receiving them in that way, he is not receiving anything which is incapable of being bequeathed for charitable purposes. Of course, what I have said ignores the recent Acts, because I am dealing with a matter to which those Acts do not apply. That being so, I come to the conclusion that this is not a charge on land: but is a charge upon what is, according to *Edwards* v. *Hall* (1), pure personalty only.

Solicitors for the charities: *Patersons, Snow, Bloxam, & Kinder.*

Solicitors for the next of kin: *Torr, Janeway, Oddie, & Sinclair.*

Solicitors for the heir: *Steavenson & Couldwell,* agents for *Piercy, Leeds.*

Solicitors for the other parties: *Pitman & Sons.*

(1) 6 D. M. & G. 74.

D. P.

NORTH, J.
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March 2.

In re GILSON.
GILSON *v.* GILSON.

[1893 G. 2226.]

Practice—Third Party Notice—"Person not a Party to Action"—Leave of Court—Premature Application—Rules of Supreme Court, 1883, *Order* XVI., *r.* 48.

An action was brought by beneficiaries against the trustees of a will to make them liable for an alleged breach of trust. The trustees claimed indemnity against the estate of a deceased beneficiary whose executors were one of the Plaintiffs, one of the Defendant trustees, and a person who was not a party to the action:—

Held, that rule 48 of Order XVI. did not apply, and that leave ought not to be given to the Defendant trustees to serve a third party notice upon the other two executors of the deceased beneficiary.

Held, also, that an application for leave to serve a third party notice made before a defence had been delivered was premature.

MOTION by two of the Defendants for leave to issue and serve a third party notice under Order XVI., rule 48.

The Plaintiff *Marianne Gilson*, widow, was, under the will of *Ann Gilson*, widow, who died on the 13th of January, 1881, entitled during her life or widowhood to the income of one-third part of the residue of the estate of the testatrix. The other Plaintiffs were the four infant children of *Marianne Gilson* (by their mother as their next friend), they being contingently entitled to the one-third, subject to their mother's life interest.

The Defendants *Robert Andrews Gilson* and *Frederick Cheeswright* were the executors and trustees of the will. *Thomas John Gilson* and his wife, two other Defendants, were interested in another one-third of the estate. The Defendant *Robert Andrews Gilson* and his wife and children were interested in the remaining one-third of the estate. The wife and one of the children were also Defendants. *Edward Rowell Gilson*, the deceased husband of the Plaintiff *Marianne Gilson*, was entitled to the income of the first one-third during his life. He died on the 8th of January, 1891. The executors of his will were the Plaintiff *Marianne Gilson*, the Defendant *Robert Andrews Gilson*, and *Henry David Roberts*, who was not a party to the action.

The Plaintiffs by their statement of claim (delivered on the 8th of December, 1893) alleged (*inter alia*) that the Defendants *Robert Andrews Gilson* and *Frederick Cheeswright* had in breach of their duty as trustees invested a portion of the residuary estate of the testatrix in the purchase of £350 Stock of the *Grand Trunk Railway of Canada*, and fifty-two shares in the *London and South African Exploration Company*, those investments being unauthorized and improper, and that a serious loss had accrued to the trust estate thereby.

The Plaintiffs claimed (*inter alia*) an account of the funds subject to the trusts of the will and of the securities upon which the same were invested; an inquiry whether the securities upon which the trust funds were invested were fit and proper investments, having regard to the trusts of the will; if it should appear that any of the securities were not fit and proper investments, an inquiry what loss had accrued to the estate of the testatrix by reason of the improper investments, and that the Defendants *Robert Andrews Gilson* and *Frederick Cheeswright* might be declared jointly and severally liable to make good the loss; if and so far as might be necessary, administration of the real and personal estate of the testatrix.

The Defendants, the trustees, had not delivered a defence, but on the 1st of February, 1894, they issued a summons, asking for leave to issue a notice, under Order XVI., rule 48, of the Rules of the Supreme Court, and to serve the same, together with a copy of the statement of claim, on the Plaintiff *Marianne Gilson* and on *Henry David Roberts*.

The summons was supported by an affidavit made by the Applicants, in which, after stating the nature of the Plaintiffs' claim, the deponents said: "We claim to be indemnified out of the estate of *Edward Rowell Gilson* against any liability in respect of the said purchases or either of them, on the ground that the same were made by *Edward Rowell Gilson* on our behalf, with notice that the moneys so invested were subject to the trusts of the will of *Ann Gilson*, and upon the undertaking of the said *Edward R. Gilson* that the investments so made by him were proper investments to be made by us out of those trust funds. In the alternative we claim to be so indemnified out of

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the estate of *Edward Rowell Gilson* to the extent of the income subsequently received by him under the trusts of the will of *Ann Gilson*, and out of her estate, or in any event to the extent of the income received by him under the trusts of the said will, out of the dividends received in respect of the said stock and shares. In the further alternative, we claim to be entitled to contribution from the estate of *Edward Rowell Gilson*, to the extent of one-third of any sum for which we may be declared liable in the action by reason of the said purchases, or either of them, on the ground that *Edward R. Gilson* in making the said purchases out of the said trust funds, with notice of the trusts affecting the same, is liable as a constructive co-trustee with us of the trust funds so dealt with by him. We are advised and believe that we have a just and true cause of action against the estate of *E. R. Gilson*."

Mr. Justice *North* in Chambers refused the application, and by their notice of motion the Defendant trustees asked that the order made in Chambers might be discharged, and an order made in the terms of the summons.

H. Terrell, for the motion:—

No doubt rule 48 of Order XVI. applies to the case of a claim to contribution or indemnity "against any person not a party to the action." *Roberts* is not a party to this action, and the Plaintiff *Marianne Gilson*, is not a party in her character of executrix of her husband, in which character the indemnity is claimed against her. The trustees could not deliver a counter-claim against her, because their claim is against her in a different capacity: *Macdonald* v. *Carington* (1); *Padwick* v. *Scott* (2). If, therefore, leave is not given to serve the notice, the Applicants will be compelled to commence a fresh action, which might perhaps be tried by a different Judge. The issue ought to be tried, once for all, in the presence of every one interested.

[NORTH, J.:—How can I deal with the matter before a defence has been delivered?]

(1) 4 C. P. D. 28, 37. (2) 2 Ch. D. 736, 743.

We want to deliver the notice with the defence.

[NORTH, J.:—How can I give leave when I do not know what is the issue between the parties?]

The only issue in the action is, whether a breach of trust has been committed.

[NORTH, J.:—In the cases referred to, the Court had the counter-claim before it. That is not so here.]

The nature of our claim is stated in our affidavit: we want to have the estate of *E. R. Gilson* declared liable to indemnify us to the extent to which he has benefited by the breach of trust.

W. M. Cann, for the Plaintiffs:—

Rule 48 does not apply. If the Plaintiff is not a party to the action, the Defendant *R. A. Gilson* must be equally not a party, and if so he can serve a third party notice on himself. But, in truth, they are both parties to the action: *Judicature Act*, 1873, s. 100. If service of the notice is allowed, the Plaintiff must defend, and she will be both Plaintiff and Defendant. The notice, if served at all, ought to be served upon all the executors of *E. R. Gilson*, and it is proposed to serve it upon two only. It does not follow that, because the Applicants cannot deliver a counter-claim, therefore a third party notice ought to be allowed. The Court has a discretion, and the notice would embarrass the trial of the action.

Moreover, the Applicants' affidavit does not shew a sufficient *primâ facie* case.

H. Terrell, in reply:—

It is enough to state upon oath the case we intend to prove.

Two executors sufficiently represent the testator's estate. If we commenced a new action, we could only make the two executors defendants.

NORTH, J.:—

In my opinion, this application must fail on several grounds. In the first place, I think the application is premature, as it is made before the Defendants have delivered their defence stating

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what their case is. The affidavit which the Applicants have made does not meet the difficulty. The defence might possibly shew that there is a case to be tried which could not properly be tried by means of a third party notice. In the next place, I do not think this case comes within rule 48. That rule provides: "Where a defendant claims to be entitled to contribution, or indemnity over against any person not a party to the action, he may, by leave of the Court or a Judge, issue a notice (hereinafter called the third party notice) to that effect, stamped with the seal with which writs of summons are sealed." Here it is sought to serve the notice upon the adult Plaintiff, who is one of the three executors of her deceased husband *E. R. Gilson*, and on *H. D. Roberts*, who is another of his executors, and who is not a party to the action. How can one of the Plaintiffs be "a person not a party to the action"? It is alleged that the estate of *E. R. Gilson* is liable to indemnify the Applicants against the claim of the Plaintiffs. The third executor of *E. R. Gilson* is himself one of the Applicants, and is a Defendant to the action. I cannot see how it would be right to allow a notice to be served on two of the executors without serving the third, the very object of the notice being to administer the estate of *E. R. Gilson*. In the third place, I am not satisfied by the evidence that the third executor ought to be brought before the Court in this way. For these reasons I do not in the exercise of my discretion think it right to give leave to serve the notice. I refuse the motion, with costs.

Solicitors: *Tippetts & Son*; *C. Ormerod, Croydon.*

W. L. C.

In re ALDRIDGE.
ALDRIDGE *v.* ALDRIDGE.

[1893 A. 1337.]

NORTH, J.

1894

March 2, 10, 13.

Partnership—Death of Partner—Business carried on by Surviving Partner—Remuneration for Services—Business carried on at a Loss.

When after the death of a partner the business is, with the concurrence of his executors, carried on by the surviving partner with a view to the benefit of himself and the estate of the deceased, he is not entitled to remuneration for his services if no profits are derived from the carrying on of the business.

SUMMONS by the executors and trustees of the will of *Thomas Aldridge*, who died on the 11th of November, 1890, and who had carried on the business of an ironmonger in partnership with his brother *William Aldridge* (one of the Defendants) asking (*inter alia*) for a declaration as to what sums (if any) were due to the Defendant *William Aldridge* for services rendered in the winding up of the business. The other Defendants were the testator's son and daughter, who were beneficiaries under his will.

The articles of partnership, dated the 15th of October, 1874, provided that the business should be conducted and carried on by *William Aldridge* alone, but that *Thomas Aldridge* should be jointly entitled to superintend, act, or interfere therein as he might think fit. The capital was provided by the testator; the Defendant *William Aldridge* had no capital in the business. The articles also provided that *William Aldridge* should engage and employ all his time and talents in the business, but, nevertheless, if the business should in the estimation and opinion of the partners be sufficient to allow the same, *William Aldridge*, as a compensation for his exclusive attention thereto as aforesaid, should be entitled weekly and every week to a sum to be mutually agreed upon, in addition to his weekly drawings for subsistence as thereinafter provided. This allowance for his services was afterwards fixed by agreement at £3 per week, and

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that sum was drawn by the Defendant *William Aldridge* weekly during the continuance of the partnership.

After the death of the testator the Defendant *William Aldridge* continued the personal management of the business, with the concurrence of the testator's executors, for the purpose of endeavouring to sell the business as a going concern, until the 15th of October, 1892, and throughout that period he, jointly with the executors, endeavoured to sell the business, but did not succeed in doing so. On the 15th of October, 1892, he withdrew from the business premises and left the realization of the assets to the executors. The executors realized the assets, and the sum realized was insufficient to pay the testator's capital. After the testator's death the business was carried on at a considerable loss.

The Defendant *William Aldridge* claimed from the testator's executors the continuance of the payment of £3 a week for compensation for his exclusive attention to the business for the period from the 11th of November, 1890, to the 15th of October, 1892.

Swinfen Eady, Q.C., and *Gatey*, for the Plaintiffs:—

There are authorities which shew that the executors of a deceased partner cannot claim profits derived from the carrying on of the business after the testator's death by the surviving partner without making a proper allowance to that partner for his services in carrying on the business: *Brown* v. *De Tastet* (1); *Burden* v. *Burden* (2); *Yates* v. *Finn* (3). But in all the cases in which such an allowance has been made the business had been carried on by the surviving partner so as to produce profits; there is no authority for giving the allowance in a case in which the business has been carried on at a loss. The business has not been "sufficient to allow" of this being done.

Oswald, Q.C., and *Pochin*, for the Defendant *William Aldridge*:—

Brown v. *De Tastet* and *Yates* v. *Finn* are authorities for giving

(1) Jac. 284. (2) 1 V. & B. 170.
(3) 13 Ch. D. 839.

an allowance to the surviving partner. There is nothing in those cases to limit the allowance to cases in which profits have been made. From *Lindley* on Partnership (1), it appears that remuneration was not allowed in *Burden* v. *Burden* (2) for the reason that the partner who carried on the business was the executor of the deceased partner; but it is clearly indicated that as a general rule remuneration should be allowed.

In *Cook* v. *Collingridge* (3), Lord *Eldon* said (4): "I have never said that the persons by whose labour and trouble the business is carried on, were not to have a reasonable allowance for it."

Houghton Brown, for the son.

Gatey, for the daughter.

Swinfen Eady, in reply, referred to *Featherstonhaugh* v. *Turner* (5), and *Mellersh* v. *Keen* (6).

[NORTH, J., referred to *Crawshay* v. *Collins* (7).]

When profits are realized by the carrying on of the business, and the partner who carries it on does not fill any fiduciary character, he is entitled to remuneration for his services before the net profits are ascertained. That is what Lord Justice *Lindley* means in the passage which has been referred to.

NORTH, J.:—

The Defendant *William Aldridge*, with the concurrence of the testator's executors, and with a view to the mutual advantage of himself and the testator's estate, carried on the business for nearly two years after the testator's death, and he claims that the allowance of £3 a week should be continued to him for the period during which he carried on the business, that being the sum which had been allowed to him for his services during the testator's life. No profit has been derived from the business since the testator's death. Under these circumstances I do not think that

(1) 6th Ed. p. 394.
(2) 1 V. & B. 170.
(3) Jac. 607.
(4) Jac. 623.
(5) 25 Beav. 382.
(6) 27 Beav. 236, 242.
(7) 2 Russ. 347.

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any remuneration ought to be paid to the Defendant. He carried on the business quite as much in his own interest as in that of the executors. He was at no risk of loss, if any loss were sustained, and I do not see how I can allow him any remuneration. There is no agreement in the articles that he shall have remuneration for his services after the dissolution of the partnership. I think he would be entitled to remuneration out of the profits of the business, if there had been profits, but there were none. If he were now allowed remuneration it must be paid out of the testator's capital. In the cases cited in which such remuneration was allowed profits had arisen from the carrying on of the business.

Solicitors: *Bull & Bull*; *Finch & Turner.*

W. L. C.

CENTRAL SECRETARIAT LIBRARY.

In re VENN & FURZE'S CONTRACT.

STIRLING, J.

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Jan. 20, 23, *Feb.* 15.

[1893 V. 710.]

Vendor and Purchaser—Title—Sale of Leaseholds by Executor—Lapse of Twenty Years since Death of Testator—Executor's Power to Sell.

In re Whistler (1) must be treated as an express decision that the twenty years' rule laid down in *In re Tanqueray-Willaume and Landau* (2) does not apply to the case of an executor selling leaseholds of his testator.

A contract for sale of renewable leaseholds provided that the title should commence with a lease to *T.*, dated in 1852, for the unexpired residue of the term thereby granted, and that the purchasers should not require an abstract of an earlier title, nor make any objection or requisition in connection therewith. The abstract disclosed that the lease was granted, in consideration (*inter alia*) of a surrendered term, to *T.*, as executor of *P.*, as to the date of whose death nothing was shewn. The next abstracted deed was an indenture, dated in 1878, whereby *T.* assigned the lease to the vendor, and entered into the usual covenants for title of a beneficial owner, no mention being made of his being an executor.

The purchaser required evidence that the sale by *T.* in 1878 was valid:—

Held, that, in the absence of anything to shew the contrary, *T.* must be presumed to have acted in the discharge of his duties as executor; and that neither the circumstance that the deed of 1878 did not purport to be executed by him as executor, nor the lapse of time, were sufficient to raise the presumption that he was acting otherwise:

Held, therefore, that the abstract shewed a good title, and that the purchasers could not insist upon their requisition.

In re Whistler followed.

In re Molyneux & White (3) explained.

ADJOURNED SUMMONS.

This was a summons under the *Vendor and Purchaser Act*, 1874, taken out by the purchasers under a contract dated the 6th of April, 1893, for the sale of certain leasehold property known as the *Devon Arms, Park Lane, Torquay.*

It was provided by the contract (clause 1) that the vendor should sell, and the purchasers should purchase, the property in question, held by lease dated the 29th of September, 1852, made between Sir *L. Palk* of the one part, and *R. H. Taylor* of the other part, for the unexpired residue of a term of years thereby

(1) 35 Ch. D. 561. (2) 20 Ch. D. 465.
(3) 13 L. R. Ir. 382; 15 L. R. Ir. 383.

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granted, at the price of £2000, £200, part thereof, to be paid by way of deposit.

Clause 3 provided that the title should commence with the said lease. Clause 5 provided as follows: "The aforesaid indenture of lease was granted in consideration (*inter alia*) of a surrendered term. The purchasers shall assume that all necessary parties concurred in surrendering the previous term to the ground landlord, and shall not require an abstract or production of such surrender, nor evidence thereof, nor of any earlier title to the said indenture of lease, nor make any objection or requisition in connection therewith."

From the abstract of title delivered by the vendor, it appeared that *Taylor* was described in the lease of the 29th of September, 1852, as executor of the last will of *William Peeke*, deceased; and that by the lease it was witnessed that "in consideration of the surrender of the term and interest of the said lessee as such executor in the hereditaments hereinafter described and of the sum of £60 to the said lessor now paid by the said lessee," the lessor demised the property for the term of ninety-nine years determinable upon lives, and with the covenant for perpetual renewal therein contained.

The next deed abstracted was an indenture dated the 7th of May, 1878, and expressed to be made between *R. H. Taylor* of the one part, and *George Venn* of the other part, being an assignment of the said hereditaments to the said *George Venn* in consideration of £900. It did not appear upon the face of this deed that *R. H. Taylor* was an executor, and the covenants entered into by him were the usual covenants of a beneficial owner upon a sale.

George Venn died in 1891, having by his will given all his property to his wife (the vendor), and appointed her his executrix.

The purchaser made the following requisition (*inter alia*) upon the title:—

"The abstracted lease was granted to *Richard Henry Taylor* as executor of the will of *William Peeke*. Such will should be abstracted, and it should be shewn that the said *Richard Henry Taylor* had power to sell and convey the property to *George Venn*."

To this the vendor replied, "See clause 5 of contract." A correspondence then ensued between the respective solicitors of the vendor and purchasers, the purchasers' solicitor stating that they did not insist upon any further abstract, provided that the vendor could shew in any way that *Taylor* had power to sell in 1878. The vendor declined to produce any evidence on the point, or to furnish any further abstract.

The purchasers thereupon took out this summons, asking (1.) that it might be declared that they were not precluded by clause 5 of the contract, or otherwise, from making the above requisition; (2.) as an alternative, that it might be declared that a good title had not been shewn to the property in accordance with the contract of sale, or otherwise, and that the vendor might repay to the purchasers the deposit of £200 paid under the contract, with interest thereon at 4 per cent. from the date of payment, and the costs of or incidental to the investigation of the title.

E. P. Hewitt, for the purchasers:—

The purchasers are not precluded by the contract from making the requisition. They do not insist upon an earlier title being abstracted, but only that the vendor should shew in any way she can that the sale by *Taylor* was valid.

At present, a good title has not been shewn. The vendor contends that a good title is shewn, relying upon *In re Whistler* (1). But the actual decision in that case did not affect the present question, because there the contract for sale was made within twenty years from the death. Moreover, the view expressed in the judgment that the twenty years' rule established by *In re Tanqueray-Willaume and Landau* (2) does not apply to a sale of leaseholds by an executor is open to question: *Farwell* on Powers (3); *In re Ryan & Cavanagh* (4); and *In re Molyneux & White* (5), which was not cited in *In re Whistler* The chief argument relied upon in *In re Whistler* was, that the twenty years' rule only applied to a sale of real estate under

(1) 35 Ch. D. 561.
(2) 20 Ch. D. 465.
(3) 2nd Ed. p. 84.
(4) 17 L. R. Ir. 42.
(5) 13 L. R. Ir. 382; 15 L. R. Ir. 383.

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a charge of debts, whereas an executor might require to sell leaseholds for administration expenses incurred by him. But this argument is unsound, since where there is a charge of debts there is also usually a charge of funeral and testamentary expenses, and this was the case in *In re Tanqueray-Willaume and Landau* (1).

Assuming, however, the view expressed in *In re Whistler* (2) to be good law, it does not apply to the present case. In this case the abstract shews that at least twenty-six years must have elapsed between the death and the sale of the lease. Moreover, the lease having been granted to the executor, and not to the testator, and the abstract not disclosing when the testator died, many more than twenty-six years may have elapsed between the death and the sale by the executor.

Again, in the conveyance by *Taylor*, there is no mention of his being an executor; but he assigns as if he were beneficial owner, and enters into full covenants for title.

In re Whistler is further distinguishable upon the ground that in that case the vendors' solicitors stated that a debt of the testator remained unpaid, whereas, in the present case, the statements of the vendor's solicitors in the correspondence are inconsistent with the view that the sale by *Taylor* was for the purpose of paying debts.

The vendor may possibly be able to shew that *Taylor* had power to sell as legatee, or as trustee. But if so, the abstract is incomplete, as the only title shewn in him by the abstract is that of executor, and as executor his power to sell had become exhausted.

T. H. Carson, for the vendor:—

The purchasers are precluded from making this requisition both by clause 5 of the contract and by sect. 3, sub-sect. 4, of the *Conveyancing and Law of Property Act*, 1881.

Where there is a sale by an executor, and the purchaser is made aware of the fact, it is to be presumed, unless the contrary is shewn, that the executor is selling as executor: *Corser* v. *Cartwright* (3). The *onus* is not upon the vendor to furnish the

(1) 20 Ch. D. 465. (2) 35 Ch. D. 561. (3) Law Rep. 7 H. L. 731.

purchaser with evidence that the sale was valid, but upon the purchaser to shew that it was invalid. The lapse of time between the death of the testator and the sale by *Taylor* does not give rise to any presumption that *Taylor* had lost his right to deal with the personal estate so as to shift the burden of proof from the purchasers to the vendor. The case is exactly within the decision in *In re Whistler* (1).

[STIRLING, J.:—If the Court had laid down any rule in that case, of course I should follow it; but it does not appear that the authorities were cited.]

Some of them were. It is an express decision that the rule in *In re Tanqueray-Willaume and Landau* (2) does not apply to a sale of leaseholds. As regards that rule, the way in which it is stated by *Jessel*, M.R., is to be observed. It is generally referred to as an absolute rule of thumb, but should not be so regarded. The rule actually laid down was not necessary for the decision of the case before the Court, and must, therefore, be considered as merely a *dictum*. Then, again, he couples the lapse of twenty years with evidence of the beneficiary being in possession, and implies that both in conjunction are sufficient to raise the presumption that the debts have been paid. Moreover, he bases the reason of the twenty years' limit upon the fact that, after that period, mortgage debts would cease to be binding. That reason does not now exist, because the limitation now applicable to the personal remedy on the covenant in a mortgage is twelve years: *Sutton* v. *Sutton* (3). The Court will follow *In re Whistler* as an English decision. It is referred to without the least disapproval in *Dart* on Vendors and Purchasers (4), and in *Williams* on Executors (5). As to the Irish decisions, *In re Ryan & Cavanagh* (6) is no authority for the proposition that an executor cannot make a title after twenty years from his testator's death. In *In re Molyneux & White* (7), the Vice-Chancellor laid it down that there was evidence that the beneficiaries were in possession. The rents of the leaseholds had been applied in payment of annuities. In

(1) 35 Ch. D. 561.
(2) 20 Ch. D. 465.
(3) 22 Ch. D. 511.
(4) 6th Ed. vol. i. p. 67; Vol. ii. p. 695.
(5) 9th Ed. p. 578.
(6) 17 L. R. Ir. 42.
(7) 13 L. R. Ir. 389.

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the same case, on appeal (1), the Lord Chancellor found that there was evidence that the debts had been paid, and the Court distinctly said that they did not decide the case upon the twenty years' rule, but they thought that under the circumstances the Vice-Chancellor was right. Again, in *Stroughill* v. *Anstey* (2), Lord *St. Leonards* held that where beneficiaries had been in possession and the trustees were selling without their concurrence the purchaser was put upon inquiry as to whether there were debts still unpaid. There are several grounds upon which I submit that the distinction drawn in *In re Whistler* (3) between an executor selling freeholds under a power, express or implied, and an executor or administrator selling leaseholds, is sound. An executor dealing with personal estate sells under his general powers not based upon the will, whereas his power to sell freeholds must turn on the exact words of the will. Again, an executor may have many duties to perform in dealing with his testator's personal estate, which he would not have in the case of real estate. This case itself affords an illustration, because the executor had to raise money to pay the fine on a renewed lease. Again, there may very possibly be deferred legacies unpaid more than twenty years after the death of the testator, as was the case in *Attorney-General* v. *Potter* (4), where it was held that the executors could, notwithstanding the lapse of twenty-four years, make a good title to leaseholds, which they were selling in order to pay the duty on the legacies. *Charlton* v. *Earl of Durham* (5) and *Gough* v. *Birch* (6), are further illustrations of the fact that the duties of an executor may be outstanding more than twenty years. All these authorities shew, as is said in *Colyer* v. *Finch* (7), that "the great convenience of mankind requires" that an executor should have as free a hand as possible in dealing with his testator's personal estate. It may be an anomaly of English law that leaseholds should be treated as personal estate; but, so long as that anomaly continues, an executor should have as unfettered power in dealing

(1) 15 L. R. Ir. 386.
(2) 1 D. M. & G. 635.
(3) 35 Ch. D. 561.
(4) 5 Beav. 164.
(5) Law Rep. 4 Ch. 433.
(6) Unreported. See Lewin on Trusts, 9th Ed. p. 531.
(7) 5 H. L. C. 905.

with leaseholds as with other forms of personalty. There is no evidence here, on one side or the other, that *Taylor's* power was still in existence. The vendor is entitled to assume, unless the contrary is shewn, that he was selling as executor. If the purchasers can bring evidence that he was not so selling, then they ought to do so. They tender no such evidence, and their summons must fail.

Hewitt, in reply:—

The rule in *In re Tanqueray-Willaume and Landau* (1), as laid down by *Jessel*, M.R., and *Brett*, L.J., does not depend upon whether a beneficiary has been in possession. This limit of time was fixed as a rule of convenience. In *In re Molyneux & White* (2), the Vice-Chancellor treated the rule as applicable to a sale of leaseholds, and the Court of Appeal took the same view, as did also the Vice-Chancellor in *In re Ryan & Cavanagh* (3). *Attorney-General* v. *Potter* (4), and *Charlton* v. *Earl of Durham* (5), were decided long before the twenty years' rule was established.

Moreover, the difficulty which the vendor has to face, in the fact that *Taylor* conveyed as if he were beneficial owner, is not got over by *Corser* v. *Cartwright* (6). In *Corser* v. *Cartwright* the sale was within a year from the death, and the vendor was beneficial owner of the property as well as an executor, and the question related, not to the character in which he conveyed, but merely to the character in which the receipt for the purchase-money ought to have been given, the land being charged with legacies.

Where under the terms of a will an executor has power to sell many years subsequently to the death, the executor is almost always also a trustee, and sells in that character. The abstract in the present case shewing no title in *Taylor* except as executor, the circumstances are such as to throw the burden of proof upon the vendor, the sale being *primâ facie* invalid.

(1) 20 Ch. D. 465.
(2) 13 L. R. Ir. 382; 15 L. R. Ir. 383.
(3) 17 L. R. Ir. 42.
(4) 5 Beav. 164.
(5) Law Rep. 4 Ch. 433.
(6) Law Rep. 7 H. L. 731.

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1894. Feb. 15. STIRLING, J. (after stating the facts of the case, continued):—

The objection in substance is that, inasmuch as twenty-six years elapsed between the grant of the lease to *Taylor* and the sale by him to *Venn*, and nothing is known of the date of the death of *Peeke*, it must be taken *primâ facie* that *Taylor's* power to sell as executor is gone, and no other title is shewn. In support of this contention, the case of *In re Tanqueray-Willaume and Landau* (1) was relied on. In that case executors purported to sell real estate under the power conferred by a charge of debts. The testator died more than ten years before the exercise of the power. Sir *G. Jessel*, M.R., said, in giving judgment (2): "The only remaining point is what period of time is sufficient to raise a presumption that the debts have been paid. Now, upon that point and on that point only I differ from *Sabin* v. *Heape* (3). I think it is clear that ten years and a half are not sufficient, but, as has been said, a line must be drawn somewhere. The question is where? In *Sabin* v. *Heape*, the late Master of the Rolls held that the lapse of twenty-seven years did not raise the presumption. I think that period too long. In *Forbes* v. *Peacock* (4) the period was twenty-five years, which the Vice-Chancellor appears to have considered too long. I think it desirable that a rule should be laid down upon which parties may act without having to come to a Court of Equity, and in my opinion the reasonable period is twenty years. The reason why I say twenty years is this—that is the period of limitation for a specialty debt, and we know as a fact that most landowners owe mortgage debts. It therefore seems reasonable to say that after the lapse of twenty years, which is sufficient to bar mortgage debts and all other specialty debts, there is a presumption that the debts are paid, especially when you find a beneficiary in the enjoyment of the estate—a circumstance mentioned by Lord *St. Leonards* in *Stroughill* v. *Anstey* (5). In this case I may say it is not so, because the widow is a trustee, and therefore it cannot be said that her being in possession of the estate shews

(1) 20 Ch. D. 465.
(2) Ibid. 480.
(3) 27 Beav. 553.
(4) 12 Sim. 528.
(5) 1 D. M. & G. 635, 654.

anything; but where you find a beneficiary in possession, and twenty years have elapsed, I think it is fair to presume that the debts have been paid, and in such a case I think that a purchaser is bound to inquire." In the present case, there is no evidence of any beneficiary being in possession. In the same case, Lord Justice *Brett* says (1): "That raises the final point, whether in this case there had elapsed a sufficient time to put the purchaser on inquiry. It seems to me that it is only after a considerable time that he is bound to ask, and the question is what time is sufficient? Unless there be some particular circumstances in the case it seems to me that, as a general rule, the question should not be asked within twenty years, but that after twenty years it will be right to ask the question."

The question whether the rule thus laid down ought to be applied to the case of an executor selling leaseholds arose in *In re Whistler* (2). The head-note to the report of that case in the LAW REPORTS is as follows: "The rule intimated in *In re Tanqueray-Willaume and Landau* (3), that where an executor is selling real estate, after twenty years have elapsed from the testator's decease, a presumption arises that the debts have been paid, and the purchaser is therefore put upon inquiry, does not in general apply to the case of an executor selling leaseholds of his testator. A testator bequeathed leaseholds to his executrix upon trust to pay an annuity, and bequeathed his residuary estate to the executrix. Shortly before twenty years had elapsed from the testator's decease the executrix contracted to sell the leaseholds at a price to be ascertained by a named person. Shortly after the twenty years had elapsed the price was ascertained. It was not shewn that there were debts of the testator remaining unsatisfied, nor did it appear that the executrix had been in possession of the leaseholds as legatee:—*Held*, that the purchaser was not entitled to require the concurrence of the annuitant in the assignment of the leaseholds." In his judgment Mr. Justice *Kay*, after referring to what was laid down in *In re Tanqueray-Willaume and Landau*, says (4): "In the first place I am not aware of any authority (I asked for one in the course

(1) 20 Ch. D. 483.
(2) 35 Ch. D. 561.
(3) 20 Ch. D. 465.
(4) 35 Ch. D. 565.

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of the argument, and I have looked so far as time would allow me to see if I could find any) that the doctrine that after twenty years from the death of a testator the power of the executor to sell personal estate must be considered to be at an end, has ever been applied by the Court in any case. I am not aware that the rule in *In re Tanqueray-Willaume and Landau* (1) at all extends to the power of an executor to deal with the personal property of the testator. The exercise by trustees of a mere power of sale, and the exercise by an executor of the right which the law gives him as executor to deal with assets vested in him in that character are two very different things, and unless I could find it so laid down by express authority, I should be very slow to say that after twenty years the Court must assume that an executor has lost his right to deal with the personal property of his testator. The suggestion is made, with which I entirely agree, that it is not merely the debts of the testator which the executor has to pay; he may have incurred expenses of administration and he may have to raise money by pledge or mortgage of the personal property of the testator, and these are matters for which it is essential that he should retain the power of dealing with the assets of the testator. Therefore it seems to me that the reason of the rule in *In re Tanqueray-Willaume and Landau*, that a power given to trustees to sell freehold estate for the payment of debts must be treated as *primâ facie* non-existent when twenty years from the date of the death of the testator have expired, is one which it is not at all necessary to apply to the case of an executor." Then he adds: "But supposing that the rule did so apply, I do not think that the present case is within it, because here the testator died on the 28th of March, 1867, and the contract was made on the 16th of March, 1887, that is, within twenty years after the death of the testator." He then comments upon that, and in conclusion says: "It seems to me that I cannot treat this case as within the rule of *In re Tanqueray-Willaume and Landau*, and I base my decision mainly on this, that I do not think that rule is applicable to the case of an executor. Of course there may be cases where an executor is plainly selling the estate not to pay debts, or plainly selling

(1) 20 Ch. D. 465.

property which is actually in the possession of a legatee, so that it is apparent that the bequest has been assented to, and in those cases it may be quite right to make such a requisition as was made here. But in this case I do not think the requisition can be supported, and I think the title is a perfectly good one." That case, although the facts in it are different from those which occur in the present, and although there the contract was entered into within twenty years of the testator's death, appears to me to be an express decision that the rule in question is not applicable to the case of an executor selling leaseholds. It is said, however, that this decision conflicts with that of *Chatterton*, V.-C., and that of the Court of Appeal in *Ireland*, in *In re Molyneux & White* (1), a case which was not cited in *In re Whistler* (2). In my opinion, those decisions were not based upon the rule in question. The Lord Chancellor of *Ireland*, in giving the judgment of the Court of Appeal, says (3): "There is potent evidence that the debts have, as a matter of fact, been paid. . . . The Vice-Chancellor came to the conclusion that there was clear evidence before him that the debts were paid, and that the vendors were violating the trusts reposed in them. But it is said that we must make this sale valid according to the doctrine of law that has been suggested. Executors, no doubt, can sell *virtute officii*, but that must be with a view to performing their *officium*. If, however, they allow such a long period of time to elapse as fairly raises the question whether there are or are not debts left unpaid, they must answer that question. In *Forbes* v. *Peacock* (4), twenty-five years was laid down as the limit: but there there was a positive direction to sell, under which the trustees were acting. That case, with *Sabin* v. *Heape* (5) and others, has since been reviewed in the Court of Appeal in *England* in *In re Tanqueray-Willaume and Landau* (6). Lord *St. Leonards* decided in *Stroughill* v. *Anstey* (7), that where trustees are selling, if the beneficial owners have been in possession for a long time, no purchaser would be safe without asking whether there are debts still unpaid. In the case in the

(1) 13 L. R. Ir. 382; 15 L. R. Ir. 383.
(2) 35 Ch. D. 561.
(3) 15 L. R. Ir. 386.
(4) 1 Ph. 717.
(5) 27 Beav. 553.
(6) 20 Ch. D. 465.
(7) 1 D. M. & G. 635.

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English Court of Appeal, which I have referred to, Sir *G. Jessel* laid down twenty years as the limit he would adopt. Lord Justice *Brett* took the same view. It is a strange thing to say that with that case before us we are to hold that here, where the executors were simply acting as trustees, they could sell a property as against the next of kin. We do not decide as to the limit of twenty years" (by which I understand the period fixed as the limit in *In re Tanqueray-Willaume and Landau* (1) to be referred to), "but we think that the order of the Vice-Chancellor was right, and that the vendors, not being able to say that there were debts still due, had no right to sell." That case seems to have been decided upon the ground that the debts had been paid, and that the executors who were selling were acting as trustees and not as executors. I think, therefore, that I am bound to hold, in accordance with what is laid down in *In re Whistler* (2), that the rule laid down in *Tanqueray-Willaume and Landau* does not apply to the present case, one reason being that the duties of an executor in connection with his testator's personal estate are not confined to payment of debts. This being so, it seems to me that the sale which took place in 1878 may well have been made in discharge of the duties of *Taylor* as executor. It is urged, however, that the deed of the 7th of May, 1878, does not purport, on the face of it, to be made by him in that capacity, and further, that inasmuch as he entered into the ordinary covenants for title, it ought to be inferred that he was selling as beneficial owner. That point is dealt with in the case of *Corser* v. *Cartwright* (3). There the question related to a mortgage made by an executor, who was also the devisee of an estate charged with the payment of debts. Lord *Cairns*, in his speech in that case, said (4): "My Lords, with regard to the power of a person situated as *John Jones* was, an executor of the testator, and also entitled as devisee to a large portion of his real estate charged with the payment of debts, there can, I think, be no doubt. I will take the liberty of referring your Lordships to two cases in which the power of persons so circumstanced is clearly laid down. Your Lordships

(1) 20 Ch. D. 465.
(2) 35 Ch. D. 561.
(3) Law Rep. 7 H. L. 731.
(4) Ibid. 736.

will find that both of these cases liken the position of a devisee, who is also an executor, having real estate charged with the payment of debts, to the position of an executor dealing with personal estate, and say that just as an executor dealing with the personal estate of a testator may sell it or mortgage it for the purpose of raising money, and as in the case of personalty it is to be inferred, unless the contrary is shewn, that he is doing that for the purpose of paying debts, so, with regard to one holding real estate charged with the payment of debts and filling the position of executor, it is also to be inferred, if he raises money by sale or mortgage of that real estate, that he is using the money, as he properly ought to use it, for the same purpose. My Lords, this was laid down in the well-known case of *Watkins* v. *Cheek* (1) by Sir *John Leach*, who said: 'So a mortgagee or purchaser from the executor of a part of the personal property of the testator has a right to infer that the executor is, in the mortgage or sale, acting fairly in the execution of his duty, and is not bound to inquire as to the debts or legacies. But if the nature of the transaction affords intrinsic evidence that the executor, in the mortgage or sale, is not acting in the execution of his duty, but is committing a breach of trust, as where the consideration of the mortgage or sale is a personal debt due from the executor to the mortgagee or purchaser, then such mortgagee or purchaser being a party to the breach of trust, does not hold the property discharged from the trusts, but equally subject to the payment of debts and legacies as it would have been in the hands of the executor. The same principle is applicable to real estate.' And Lord *Cranworth*, in advising your Lordships' House in the case of *Colyer* v. *Finch* (2), which has been referred to, said (3), 'It does not matter that the mortgage to Mr. *Finch* was not made avowedly' —that is, on the face of it—'for the purpose of raising money to pay debts; that is not at all necessary, unless it was apparent on the face of it that it was not, and could not have been, so intended. I very much incline to think that when a party, the devisee of real estate charged with the payment of debts, sells,

(1) 2 S. & S. 199. (2) 5 H. L. C. 905.
(3) 5 H. L. C. 923.

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the purchaser has no need to inquire at all whether the money is applied in payment of debts, or whether it is a sale for the purpose of enabling debts to be paid. The old case of *Elliot* v. *Merriman* (1) which is always referred to, before the Master of the Rolls, makes no such distinction as to whether it was expressed to be made for payment of debts or not. If there is a charge on the devisee in fee, if he takes the estate charged with the payment of debts alone, or debts and legacies, and if he sells, the great convenience of mankind requires that it should be just as if an executor sells when property comes to him, unless it can be shewn that the purchaser knew that the purchase-money was not going to be so employed, and that he was ancillary to something like a fraud. It is to be presumed, because he may presume, that the sale has taken place in the ordinary administration of the duties which were imposed upon the executor by the will.'" It appears to me that I have the high authority of Lord *Cairns* and Lord *Cranworth* for saying that where a person who fills the position of an executor is found selling or mortgaging part of his testator's estate, he is to be presumed to be acting in the discharge of the duties imposed on him as executor, unless there is something in the transaction which shews the contrary; and further, that the contrary is not made out merely from the circumstance that the conveyance or mortgage does not purport to be executed by him in that capacity. Beyond the lapse of time and the frame of the deed of the 7th of May, 1878, there is nothing in the present case which gives rise to the suggestion or inference that *Taylor* was acting otherwise than in the discharge of his duty as executor. Neither the lapse of time nor the frame of the deed is sufficient, in my judgment, to raise the presumption that he was acting otherwise. In my opinion, therefore, the abstract delivered by the vendor discloses a *primâ facie* title on his part in accordance with the contract, and the purchasers are not, in the state of circumstances now disclosed, entitled to insist on their requisition. This decision in no way precludes the purchasers from themselves making inquiry as to the terms of the will of *William Peeke*; and it is needless to say that I express

(1) 2 Atk. 43; Barnard. Ch. Ca. 78.

no opinion as to what would be the effect of an objection to the title based on the result of such inquiries. I will, according as the purchasers wish, make a declaration either that a good title has been shewn in accordance with the contract, or that the purchasers are precluded by the contract from making their requisition.

Hewitt:—The purchasers prefer that your Lordship should make a declaration that a good title has been shewn.

STIRLING, J.:—Very well, I make that declaration. The purchasers must pay the costs of the summons.

Solicitors: *Belfrage & Co.*, agents for *E. Lee Michell, Wellington, Somerset; Wood, Bigg, & Nash*, agents for *Kitson, Mackenzie, & Co., Torquay.*

G. A. S.

In re COLMAN'S TRADE-MARK APPLICATION.

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1894
Feb. 14, 15.

Trade-mark—Registration—Disclaimer—"Own Name"—Distinctive Label—Essential Particulars—Added Matter—Patents, Designs, and Trade Marks Acts, 1883-88 (46 & 47 *Vict. c.* 57; 51 & 52 *Vict. c.* 50), *s.* 64.

The proviso in sect. 64, sub-sect. 3 (1) of the *Patents, Designs, and Trade Marks Acts*, 1883-88, that "a person need not under this section disclaim his own name" is applicable in the case of a firm applying to register a trade-mark on which the firm-name appears, and whether the applicant is an individual or a firm, the name need not be disclaimed, under s. 64, sub-sect. 2, whether the name appearing on the trade-mark is the whole name of the individual or firm, or not, so long as it is used fairly and *bonâ fide* as representing the name of the owner of the trade-mark:—

Semble, that the same rule applies whether the name used is the actual name of the applicant, or a name assumed for trading purposes.

The firm of *J. & J. Colman*, consisting of five persons named *Colman*, applied to register a label for mustard on which appeared the words, "*Colman's Mustard*":—

Held, that the Applicants need not disclaim the name "*Colman*."

Alexander Pirie & Sons v. *Goodall* (1) explained.

Whether any disclaimer can be required under sect. 64, sub-sect. 2,

(1) [1892] 1 Ch. 35.

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of words appearing on a label which is as a whole a distinctive label, and therefore an essential particular, within sect. 64, sub-sect. 1 (*c*), *Quære.*

MOTION.

This was an appeal by the firm of *J. & J. Colman* of *Norwich* and *London*, manufacturers of mustard, starch, blue and other goods, against the decision of the Comptroller-General of Patents, whereby he refused to allow registration of a certain trade-mark tendered by the Applicants, except upon conditions with which they declined to comply.

The Applicants' firm was founded in the early part of the present century, and the partners therein had invariably been members of the *Colman* family, and the name of the firm had always been "*J. & J. Colman*," the initials being those of the original founders. The expressions "*Colman's Mustard*," "*Colman's Starch*," "*Colman's Blue*," and so forth had, according to the Applicants' evidence, long been well-known as indicating that the goods in connection with which such names were used were of the Applicants' manufacture, and the Applicants had obtained injunctions to restrain the sale of spurious goods under similar names. The names in question appeared on a great variety of labels used by the Applicants for various periods on their goods, and in many cases their well-known Bull's Head trade-mark also appeared thereon.

Among other labels for mustard the Applicants had for several years, but not prior to the passing of the *Trade Marks Registration Act*, 1875, been in the habit of using four varieties of labels, each intended for pasting round an oval penny tin of mustard, and so arranged as to shew a complete design on each of the two principal sides of the tin. In each case one side of the label bore a representation of a flag, and the other was arranged as a horizontal tricolour with "*Colman's*" on the top stripe, and "*Mustard*" on the bottom stripe, and the device of a bull's head, and the words, "*Bull's Head*" on the middle stripe. On the first of the four varieties the flag was a Russian flag; on the second a British Royal Standard; on the third a Union Jack; on the fourth an American Stars and Stripes. On the first and second varieties the words "*Colman's Mustard*" appeared also on

the flag side. The tricolour was, in the first two varieties, red, yellow, and black; on the third, red, yellow, and blue, and on the fourth, yellow, red, and blue. The four varieties of labels above described were used on pure mustard; but each of them was also used on condiment-mustard, but with a notice of the article being mixed, under the *Sale of Food and Drugs Act*, 1875. In these cases the notice was inserted between the two sides of the label.

The Russian flag label was registered in 1888, without the condiment notice, as No. 63398, and with the condiment notice, as No. 63395. The tricolour side only of the Union Jack label was registered in 1888, without the condiment notice, as No. 63399, and with the condiment notice as No. 63396. In these cases the Comptroller had refused to allow the British flag to be registered as part of the labels. The Royal Standard and Stars and Stripes labels were not registered. No disclaimers were entered at the time of registration of any of the four registered labels; but when, in 1891, Mr. Justice *Kekewich* gave leave for the words "*Trade Mark*" to be removed from these and other labels: see *In re Colman's Trade Marks* (1); he imposed as a condition that the Applicants should indorse on their applications for registration and enter in the Register of Trade Marks a statement of the essential particulars of each trade-mark, and a disclaimer of any exclusive right to the added matter (if any), to the satisfaction of the Comptroller-General, and in pursuance of this condition a form of claim and disclaimer was settled with the Comptroller-General which was the same for all the four registered labels, Nos. 63395–6–8–9, and was as follows: "The essential particulars of the trade-mark are (1.) the entire distinctive label; (2.) the words, '*Bull's Head*'; and the owners disclaim any right to the exclusive use of the added matter, except in so far as it consists of their name." These claims and disclaimers were duly indorsed on the applications, entered in the register, and advertised in the *Trade Marks Journal*, No. 700, at p. 813.

On the 19th of January, 1893, Messrs. *Colman* applied to register the Stars and Stripes label, without the condiment notice, under the No. 170028. They stated the essential particulars to

(1) [1891] 2 Ch. 402.

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be the entire distinctive label and the words "*Bull's Head*," and they disclaimed any right to the exclusive use of the word "*Mustard*."

In March, 1893, the Comptroller required the Applicants to amend their application so that it might be in the following terms: "The essential particulars are the combination of bull's head and flag devices, and the words '*Bull's Head*,' and the Applicants disclaim any right to the exclusive use of the added matter."

The Applicants objected to this requirement on the ground that it involved a disclaimer of the name "*Colman*," and the case was argued by counsel on their behalf before the Comptroller, but he, in May, 1893, gave a written decision adhering to his requirement and refusing registration for want of compliance with it.

The Applicants appealed to the Board of Trade, the grounds of appeal being stated by their case on appeal to be as follow:—

"1. Because the trade-mark No. 170028 is a distinctive label as a whole, and as such is, as a whole, an essential particular within the provisions of the Acts.

"2. Because there is nothing added to such essential particular, and the Acts contain no provision authorizing the requirement of any disclaimer where there is nothing added to an essential particular.

"3. Because the Appellants are expressly protected by the provisions of the Acts against any requirement of a disclaimer of their own name.

"4. Because if the trade-mark is registered as desired by the Appellants, the Appellants will acquire an exclusive right in the mark as a whole and not in the separate parts thereof.

"5. Because, if the trade-mark is registered as desired by the Appellants, the right of any owner of the name '*Colman*' to use that name, or the foreign equivalent thereof, will, by the express provisions of the Acts, not be affected by such registration.

"6. Because, if the Appellants are required to disclaim the said name, they will be injured in their business, and the public will be exposed to deception."

The Board of Trade referred the appeal to the Court, and the appeal was now brought on by way of motion to reverse the decision of the Comptroller, and to direct the registration to proceed.

Sir *R. Webster*, Q.C., *Cozens-Hardy*, Q.C., and *Sebastian*, for the motion:—

The trade-mark proposed to be registered is a "distinctive label" within sect. 64, sub-sect. 1 (*c*), of the *Patents, &c., Acts*, 1883–88, and the entire label is therefore an "essential particular" within the Acts. *In re Hanson's Trade Mark* (1) is not opposed to this view. That being so, the provisions of sect. 64, sub-sect. 2, under which the Comptroller requires the disclaimer to be made, do not apply, for those provisions only enable the Comptroller to call for a disclaimer where words are added to an essential particular, and where the whole thing is the essential particular there is nothing added. This view is supported by the judgment of the Court of Appeal in *In re Apollinaris Company's Trade Marks* (2), where Lord Justice *Fry* said (3) that the word "*Friedrichshall*," which was on the label, was not additional to it, and therefore need not be disclaimed under sect. 74. Although the point there turned on sect. 74, the question was the same, for there is no distinction between the terms "added matter" in sect. 64, sub-sect. 2, and "addition to any trade-mark" in sect. 74, sub-sect. 1. The suggestion made by *Cotton*, L.J., in *In re Hudson's Trade Marks* (4), that if the application in that case had been under the Act of 1883, a disclaimer of the words "*Carbolic Acid Soap Powder*" on the label might have been required, was a mere *dictum* without argument. In *Pinto* v. *Badman* (5) there was an elaborate label on which the words "*El Destino*" appeared with other matter, and Lord Justice *Fry* said (6), "Surely it" (*i.e.* "*El Destino*") "is part of the mark and sect. 74 has nothing to do with it," and Lord *Esher*, M.R., said (7), "The truth is that the label does not

(1) 37 Ch. D. 112.
(2) [1891] 2 Ch. 186.
(3) Ibid. 233.
(4) 32 Ch. D. 311, 323.
(5) 8 Rep. Pat. Cas. 181.
(6) Ibid. 188.
(7) 8 Rep. Pat. Cas. 191.

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consist of each particular part of it, but consists of the combination of them all." The whole matter was summed up by Mr. Justice *Chitty* in *In re Smokeless Powder Company's Trade Mark* (1), in which he held that no disclaimer could be required.

But, in any event, the Comptroller cannot require the name "*Colman*" to be disclaimed. Sect. 64, sub-sect. 3 (i), provides that "a person need not under this section disclaim his own name or the foreign equivalent thereof," and here the name "*Colman*" is not only the name of the firm, but it is the name of every individual member of the firm, and this has always been so. The omission of "*J. & J.*" before "*Colman*" cannot affect the question. If the name is not disclaimed, no harm will be done, for sect. 64, sub-sect. 3 (i), provides that the registration without disclaimer is not to "affect the right of any owner of the same name to use that name or the foreign equivalent thereof." Besides which, the registration of the label as a whole does not give an exclusive right to any separate part: *In re Hudson's Trade Mark* (2); *In re Atkins' Trade Mark* (3). On the other hand, to insist on the disclaimer will be to the prejudice both of Messrs. *Colman* and of their customers, for if a disclaimer were entered an injunction might be refused, even in a case of fraud, as in *Rosenthal* v. *Reynolds* (4), where the action was brought, not on trade-mark, but on the getting-up of corsets by placing the same letters "*W. R.*" in the same type and on the same particular spot, and yet relief was refused, because of the disclaimers entered on the registration of certain trade-marks. In fact, the risk would be so great that Messrs. *Colman* would be prevented from registering any more of their labels at all. The interpretation now put on the section by the Comptroller is quite a new departure. Various traders have registered labels bearing their names, and have not been required to disclaim. The practice of the office is absolutely inconsistent, for in *In re Colman's Trade Marks* (5) the Comptroller did not require any disclaimer of the word "*Colman's*," which was upon all the labels then in question.

(1) [1892] 1 Ch. 590.
(2) 32 Ch. D. 311.
(3) 3 Rep. Pat. Cas. 164.
(4) [1892] 2 Ch. 301.
(5) [1891] 2 Ch. 402.

Sir *J. Rigby*, S.-G., and *Ingle Joyce*, for the Comptroller-General:—

There is no sort of estoppel arising out of the way in which the Comptroller has dealt with previous applications.

The construction sought to be placed upon sect. 64 is untenable, for the whole of the section must be read together, as was lately held by the Court of Appeal in the "*Somatose*" *Case* (*In re Farbenfabriken Application* (1)), and the whole object of the disclaiming provisions is to compel applicants for registration to state distinctly what they claim and what they do not; and this object would be frustrated if they could avoid disclaiming words by combining them into a label. The words on a label do not, in truth, form part of it at all. The fair reading of the section is that when words or names are used with a mark they are to be either claimed or disclaimed, except only where the name is such as to be protected from disclaimer by sect. 64, sub-sect. 3 (i). The meaning of that provision is that the entire name must be used if a disclaimer is to be avoided, and if the present Applicants can use "*Colman's*" without disclaimer, the *Smokeless Powder Company* could similarly use "*Smokeless Powder*" without a disclaimer. We do not deny that "person" in sect. 64, sub-sect. 3 (i), ought to be read so as to include a firm, and if the name on the label were "*J. & J. Colman*" the case would be different, but it is, in fact, simply "*Colman's*" in the possessive case, and, as Lord Justice *Lindley* said in *Alexander Pirie & Sons* v. *Goodall* (2), a name printed in the genitive case, and with an apostrophe, is not the name of an individual and is not the name of a firm. If a partner whose name was not "*Colman*" were taken into the firm, how could he escape disclaiming? And other partners may be taken into the firm any day. In the cases under sect. 74 the real question was, not so much whether the words were additional to the trade-mark, as whether they were common to the trade, so that they are not really in point. In *In re Hudson's Trade Mark* (3) *Cotton*, L.J., clearly considered that a disclaimer of words on a label could be required, if they were common to the trade, but in that case the application was made before the Act

(1) [1894] 1 Ch. 645. (2) [1892] 1 Ch. 43.
(3) 32 Ch. D. 311.

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of 1883. From the report of *Pinto* v. *Badman* (1) it would appear that the label was used before the Act of 1875, and, if so, it was an old mark, and exempt from disclaimer.

[Sir *R. Webster*:—That was not so; the advertisement in the *Trade Marks Journal* shews that old user was not alleged.]

The decision in *Rosenthal* v. *Reynolds* (2) merely amounted to a refusal to grant an interlocutory injunction where all the defendants were doing was using on goods a mark which had been disclaimed, and it is clear that fraud will always be stopped. The label here is not really a distinctive label at all. The bull's head device is good, and the flag may perhaps be taken into consideration, so that it would be proper to claim the combination of devices, but the tricolour must be disregarded: *In re Hanson's Trade Mark* (3). The disclaimer is necessary in order to prevent genuine *Colmans* from being terrorized. If the whole label is the essential particular, it cannot be varied under sect. 92, even by adding the word "limited" if the firm were turned into a company. The disclaimer of the word "mustard" precludes the Applicants from refusing to disclaim.

Sir *R. Webster*, in reply:—

If the disclaimer of "mustard," which was only inserted for the purpose of meeting the Comptroller's views, is held to preclude the Applicants from claiming total exemption from the liability to disclaim, I ask that the disclaimer may at all events not go beyond that settled with the Comptroller in 1891, when the name was excluded from the disclaimer. With respect to the Comptroller's present requirement of the disclaimer of the name, *Pirie's Case* (4) is not in point, for the question there was not as to what names require to be disclaimed under sect. 64, sub-sect 3 (i), but as to what names ought to be regarded as being printed in a distinctive manner under sect. 64, sub-sect. 1 (*a*). The advertisement in the *Trade Marks Journal* shews that the mark consisted of the mere words "*Pirie's Parchment Bank*," in ordinary type, and that no claim was made to use

(1) 8 Rep. Pat. Cas. 181.
(2) [1892] 2 Ch. 301.
(3) 37 Ch. D. 112.
(4) [1892] 1 Ch. 35.

before 1875. In *In re Hanson's Trade Mark* (1) there was nothing beyond the tricolour, but here there are words and devices which make the label distinctive. Fraud will no doubt be restrained by injunction without the name being registered, but the case where there is registration with a disclaimer is entirely different from the case where there is simply no registration. The effect of the disclaimer is to tell people that they may use the name. The intention of the Legislature, in inserting the proviso as to names, was to protect business names as used by business people. A person's "own name" does not necessarily mean his whole name. "*Colman*" is the name of the Applicants' firm in the ordinary business sense, and it is the "own name" of every one of the Applicants, if that be necessary. It is lawfully a part of the trade-mark, and ought not to be disclaimed.

STIRLING, J.:—

This is an appeal from the decision of the Comptroller brought before the Court by the direction of the Board of Trade. The question which is raised may be very shortly stated from the documents which I have before me. There are five gentlemen, all named *Colman*, who carry on, in partnership, the business, amongst others, of manufacturers of mustard at *Norwich*, under the name or style of *J. & J. Colman*. They, in the beginning of the year 1893, applied to the Comptroller to register a new label, of which I have a copy before me. The form of the application is: "You are hereby requested to register the accompanying trade-mark in class 42, in respect of mustard in the name of *J. & J. Colman*, of 108, *Cannon Street, London*," and so forth, "claiming to be the proprietors thereof; the essential particulars of the trade mark are the entire distinctive label and the words '*Bull's Head*,' and we disclaim any right to the exclusive use of the word 'mustard.'" I have heard the history of this form of application, which is somewhat peculiar as regards the essential particulars, and it appears to have been adopted from a form which had been sanctioned by the Comptroller on a previous occasion. It does not seem to me, if I may be allowed to make the criticism, to be a very happy one, because it leaves at

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large the question, what is meant by the entire distinctive label? But it is to be inferred, I think, from the form of the application, that the entire distinctive label did not include everything which appeared on the label; that some of the words, at any rate, were not essential parts of it, because there was a separate claim for the words "*Bull's Head*," and there was a disclaimer of the exclusive use of the word "mustard." On the 7th of March, 1893, the Comptroller writes: "With reference to your application, I am directed to return the form in order that it may be so amended as to contain the statement and disclaimer in accordance with sub-sect. 2 of sect. 64 of the *Patents, Designs, and Trade Marks Acts*, 1883 to 1888, in the following terms: 'The essential particulars of the Trade Mark are the combination of bull's head and flag devices, and the words '*Bull's Head*,' and the Applicants disclaim any right to the exclusive use of the added matter.'" If I may make the criticism, that is a much better statement of the essential particulars of the trade-mark than that which is contained in the application, because it specifies with sufficient clearness those essential particulars; but it is to be observed that the Applicants are required to disclaim any right to the exclusive use of the added matter without any exception whatever, and to that the Applicants took exception on the ground that part of the added matter consisted of the word "*Colman's*," which is a part—and the most essential part—of the trade name of the firm, and of the names of the individual parties. I shall call attention, in a moment, to the clause of the Act of Parliament on which that objection is based; in the meantime I may shortly state that they desired to add to the form of statement which the Comptroller required them to sign, an exception in these terms, "except in so far as it consists of our name," an exception which had been sanctioned, as I understand, by the Comptroller on a previous occasion when some of the trade-marks of the same firm were before him. The matter was argued before him, and in the judgment which has been read to me, he ultimately decided that he could not allow that exception; and in that state of things the matter comes before me.

Now, the material section of the Act of 1883 is the 64th, as altered by the Act of 1888. It runs thus: "For the purposes

of this Act, a trade-mark must consist of or contain at least one of the following essential particulars: (*a*) A name of an individual or firm printed, impressed, or woven in some particular and distinctive manner; or (*b*) A written signature or copy of a written signature of the individual or firm applying for registration thereof as a trade-mark; or (*c*) A distinctive device, mark, brand, heading, label, or ticket; or (*d*) An invented word or invented words; or (*e*) A word or words having no reference to the character or quality of the goods, and not being a geographical name." Then the second sub-section is: "There may be added to any one or more of the essential particulars mentioned in this section any letters, words, or figures, or combination of letters, words, or figures, or of any of them, but the applicant for registration of any such additional matter must state in his application the essential particulars of the trade-mark, and must disclaim in his application any right to the exclusive use of the added matter, and a copy of the statement and disclaimer shall be entered on the register. (3.) Provided as follows: (i.) A person need not under this section disclaim his own name or the foreign equivalent thereof, or his place of business, but no entry of any such name shall affect the right of any owner of the same name to use that name or the foreign equivalent thereof."

Now, two points upon that section have been argued before me. In the first place it is contended, on behalf of the Applicants, that this is a distinctive label entitled to registration under sub-sect. 1 (*c*), that it is a distinctive label consisting of everything that appears on the face of it, including the words "*Colman's mustard*," and that there is nothing which, in the language of sub-sect. 2 ought to be regarded as additional matter. I do not propose to decide anything on that question; in strictness it does not seem to me to be open, having regard to the form of the Applicants' application, and the letter of the Comptroller of the 7th of March, 1893.

I have not heard Sir *Richard Webster* in reply upon this point; and therefore I only say that at present, not having heard him in reply, but having heard the argument of the Solicitor-General upon it, I am not satisfied that the argument of the Solicitor-

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General may not be well founded. However, I decide nothing in respect of that, but leave the matter to be decided on a future occasion if necessary.

The second point is, that the Comptroller is requiring the Applicants to disclaim matter which the Act does not compel an applicant to disclaim. There is an express proviso that a person need not, under this section, disclaim his own name, and the word "*Colman*," or "*Colman's*," which appears on the label, is stated to be the name of the Applicants; but the Comptroller has held that the word "*Colman's*" is not the name of the Applicants, mainly, I think, on the ground of a decision of the Court of Appeal in the case of *Alexander Pirie & Sons* v. *Goodall* (1), to which I shall call attention presently.

Now, before I deal with that case, let me look at the language of the section, and the object which the Legislature appears to have had in view in the various enactments which are contained in it. I may perhaps begin usefully by referring back to sect. 62, which relates to the application for registration, and that begins thus: "The Comptroller may, on application by or on behalf of any person claiming to be the proprietor of a trade-mark, register the trade-mark." "Person" there, though used in the singular, may, according to the provisions of the *Interpretation Act* of 1889, or the statutes which that Act replaces, be treated as used in the plural number; but, beyond that, it is expressly enacted by sect. 117, that "person" includes "body corporate." Then, sect. 63 is immaterial, but it is observable, when we come to sect. 64, that the Legislature in sub-sect. 1, no doubt for special reasons, has departed from the language of sect. 62, and no longer uses the word "person." "For the purposes of this Act, a trade-mark must consist of or contain at least one of the following essential particulars: (*a*), a name of an individual or firm printed, impressed, or woven in some particular and distinctive manner; or (*b*), a written signature or copy of a written signature of the individual or firm applying for registration thereof as a trade-mark." Instead of using the general word "person," for some reason the Legislature has thought fit to speak there of the name of an individual or firm. Upon that

(1) [1892] 1 Ch. 35.

it is possible that some day a question may arise whether the name of a "body corporate" is included, that is, whether a body corporate can be treated as an "individual"; but I say nothing on that. I call attention to variation in the language from the 62nd section, because, in the 3rd sub-section of the same 64th section we find this: "A person need not under this section disclaim his own name." The Legislature, for some reason or other, has there reverted to the language of sect. 62, and no longer speaks of individuals or firms. Now, under sub-sect. 1 of sect. 64 the Legislature is engaged in defining the essential particulars of a trade-mark. In sub-sect. 2 the Legislature goes on to provide that to any one or more of the essential particulars mentioned in this section, any letters, words, or figures, or combination of letters, words, or figures may be added. Therefore, a person registering a trade-mark is not confined to the essential particulars as defined by sub-sect. 1, but may add other matter. Then there is upon that imposed this proviso that the applicant for registration of any such additional matter must state the essential particulars, and must disclaim the added matter. Then upon that comes a further proviso or qualification that "A person need not under this section disclaim his own name or the foreign equivalent thereof, or his place of business." Now, the object of that seems to have been this: that persons who are owners of trade-marks, or desire to have them registered, are to be entitled to register them, not, so to speak, as bare trade-marks consisting of the essential particulars defined by sub-sect. 1; but are to be allowed to make statements with reference amongst other matters to those who manufactured the goods, and the place where the goods were manufactured. The object seems to have been to enable the owner of the trade-mark to state on the face of the mark who was the owner, that is to say, the manufacturer of the goods to which the mark applied and the place at which they were manufactured, so as to identify the goods denoted by that mark with that particular manufacturer and that particular place of manufacture.

The first objection which is raised to the contention on behalf of the Applicants with reference to this disclaimer is that the word "*Colman's*" is not the name of the person registering

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within the meaning of this sub-section. Now, I shall begin, for the purpose of explaining my view, with what seems to be a simpler case than the present. I shall take, as the subject of manufacture, the article in question, namely, mustard. I shall suppose that one *John Smith* desires to register a trade-mark containing certain essential particulars with this addition: "*Mustard manufactured by John Smith.*" Now, I cannot see why that addition should not be made. It seems to me to fall strictly within such additions as are mentioned in sub-sect. 2, being a combination of words. Under sub-sect. 2, *John Smith*, desiring to register, is required to disclaim the additional matter with the exception of his own name. *John Smith* is his name, and therefore he is not required to disclaim the words "*John Smith*" upon the mark so intended to be registered. That, so far, seems to me to be clear upon the very language of the Act. But, if I understand the contention rightly, it is said that, although he might register a trade-mark with the words "*Mustard manufactured by John Smith,*" he must not register a trade-mark with the words "*Mustard manufactured by Smith,*" without a disclaimer of the whole additional matter, including the name *Smith*. That does seem to me to be a very extraordinary contention; but of course I am bound by authority if such exists; and it is said that an authority to that effect does exist in the decision of the Court of Appeal in the case of *Alexander Pirie & Sons* v. *Goodall* (1), to which I have been referred. Now, in that case there had been registered a mark, of which I am furnished with a copy. "*Pirie's Parchment Bank*" were the words registered, and on the side there is this disclaimer: "The Applicants do not claim any right to the exclusive use of either the word '*Parchment*' or the word '*Bank*' appearing in connection with this mark." So that all that remained as an essential part of the mark, if it were well registered, was the word "*Pirie's.*" In an action for an infringement of the mark brought by Messrs. *Pirie* against Messrs. *Goodall*, Mr. Justice *Vaughan Williams* decided that the mark was not a good one. In the Court of Appeal it was contended that the mark might be supported as being under sect. 64, sub-sect. 1 (*a*), a name of an individual or firm

(1) [1892] 1 Ch. 35.

printed, impressed, or woven in some particular and distinctive manner. Now, Lord Justice *Lindley*, in delivering the judgment of the Court of Appeal, says this—I read from the report at p. 20 of the 9th volume of the Reports of Patent Cases: "Mr. *Willis Bund* started a point which had been started in the Court below, but which his leader had not the courage to start here. He says the trade-mark is '*Pirie's*,' and that these words '*Parchment Bank*' are mere additions to that. Well, to dispose of that point, we have to read the section, which is sect. 64, and to ask ourselves whether '*Pirie's*' as printed here in the genitive, with a comma, is 'the name of an individual or firm, printed, impressed, or woven in some particular and distinctive manner.' Well, it is not the name of an individual, it is not the name of a firm. I cannot say, of course, off-hand, whether it is printed in any particular or distinctive manner. All that is shewn upon the register is that the letters are printed in outline. That is common enough, but the true answer to this is, that it is an ingenious suggestion, and '*Pirie's*' is not the name of an individual and is not the name of a firm." I, of course, entirely bow to that decision. I am not quite sure how far it goes, because the Lord Justice is careful to point out that the trade-mark is "*Pirie's*" printed in the genitive with a comma, and I am not sure that he was not really dealing with that, and saying that the name as it there appeared in the genitive could not be the name either of an individual or of a firm. I am not sure that he meant to treat the case as if the name of *Pirie* alone had appeared in the trade-mark; but, for the purpose of my decision, I desire to adopt the view that it was there held that the word "*Pirie*" alone, being merely part of a name, could not be the name of an individual or the name of a firm within sect. 64, sub-sect. 1 (*a*). Does it follow that I ought to extend that doctrine, if it was thus laid down, to the case of a person who seeks to justify the retainer of such a word as "*Colman's*" upon a trade-mark under the proviso contained in sub-sect. 3? It seems to me that I am not bound so to hold. As I have already pointed out, sect. 64, sub-sect. 1, defines the essential particulars of a trade-mark. The Legislature has limited in various ways and in various directions those essential particulars.

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If it is to be held that "individual" or "firm" does not include "body corporate," not every name will fit into the definition in sub-sect. 1 (*a*); and as regards words other than names, they are limited very carefully by sub-sect. 1 (*d*) and (*e*). Therefore it well may be that when a person comes to register a trade-mark and has to make out that his mark includes one of the essential particulars mentioned in the Act, the Act ought to be read in the strictest manner against him, and he ought not to be allowed to register a mark unless he makes out clearly that it does include one of the essential particulars named there. But when we come to the added matter which is to be disclaimed, except always his own name or his own place of business, it seems to me that there is no necessity for reading the Act so strictly. The object being that the goods to which the mark is affixed might be pointed out as being those of a particular manufacturer carrying on business at a particular place, then, so long as the manufacturer fairly uses his name, or a part of his name, upon a mark which complies in other respects with the Act, and, so long as he is not, by suppressing part of this name, guilty of any misrepresentation so that the mark ought to be treated as being calculated to deceive, I cannot see why he may not use a part of his name. If nothing short of the whole name will do, then, even the use of an initial to denote the Christian name would seem to call for a disclaimer. I cannot believe that that was intended, and it seems to me that if *John Smith*, of whom I spoke before, desired to register his trade-mark with reference to mustard as "*Mustard manufactured by Smith*," he ought not to be called upon to disclaim "*Smith*," which forms the leading part of his own name.

Now, having got so far, does it make any difference, that he seeks to register a label with "*Smith's Mustard*" upon it? I cannot see why it should. He could register "*Mustard manufactured by Smith*" as it appears to me; he could register "*Mustard the manufacture of Smith*," and if he chooses to abbreviate and put "*Smith's Mustard*" why he should not do it I cannot see. It was suggested that it was a description of the mustard and not a real use of his own name, but *primâ facie* the words "*Smith's Mustard*" upon a trade-mark denote that *Smith*

is the owner of the trade-mark, and the manufacturer of the mustard.

So far for a single person trading in his own name. I have next to consider the case of a firm, because here is a firm consisting of five individuals. There is a little difficulty in construing the section with reference to a case of a firm. In this particular case the partners are all named *Colman*. The name of the firm, as I have said, is *J. & J. Colman*. It was contended by the Solicitor-General, and I am far from saying that there is not a great deal in his argument, that sub-sect. (i) ought, for the purposes of trade-marks belonging to a firm, to be read "a firm need not under this section disclaim their own name." In that case, the firm name being *J. & J. Colman*, if they put *J. & J. Colman* on the trade-mark, they do not require to disclaim it. Another suggestion is that I am simply to adopt the language of the *Interpretation Act*, and read the words "a person" as in the plural, so that "persons" need not under the section disclaim their own name, and treat the five Applicants as a group of persons all bearing the name of "*Colman*" who apply for the registration of a trade-mark. I think there is very great force in the argument of the Solicitor-General that the fair and business-like way of reading the section where persons apply as a firm would be to read it in the first way, namely, "a firm need not" or "persons trading as a firm need not under this section disclaim their own name," and treat the name of the firm as the name of the group of persons for this purpose. A similar question might arise, I conceive, with reference to a single individual, because the *John Smith* whom I have mentioned might for good and sufficient reasons trade under the name of *John Jones*, and if he sought to make an application in his business name of *John Jones* and to put "*John Jones*" on his trade-mark instead of "*John Smith*," it might very well be that the Court or the Comptroller would treat "*John Jones*" as the name of *John Smith* for the purpose of his application within the meaning of the proviso. I have not, however, on this occasion, as it seems to me, to decide between the various constructions of that proviso as applied to firms. I have already said that *Colman* is the name of every partner; *J & J. Colman* is the name of the

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firm. I have held that the whole name in the case of a single person need not be placed on the trade-mark. It seems to me that equally the whole name of each partner or the whole name of the firm need not appear on the trade-mark, and that it is sufficient as before if we find that the name is used fairly and *bonâ fide* on the face of the trade-mark in such a way that it cannot be mistaken for anything else than the name of the owner of the trade-mark and the manufacturer of the goods to which that mark relates. In my judgment, therefore, the form which was settled and adopted by the Comptroller on the former occasion was the proper one, namely, that the disclaimer ought to run thus:—"And the owners disclaim any right to the exclusive use of the added matter except in so far as it consists of their name." It seems to me that on the grounds which I have stated, the decision of the Comptroller ought to be varied.

Sir *R. Webster*, Q.C.:—

I do not know what your Lordship will do about costs in this case?

STIRLING, J.:—

I will express my opinion in this case without prejudice to the general right of the Comptroller to receive his costs, if such be the rule: this is a case in which he might very fairly waive such right, and the proper order will be no costs.

Solicitors for Applicants: *E. Flux, Leadbitter, & Paterson* agents for *W. H. Tillett & Co., Norwich.*

Solicitor for Comptroller: *Solicitor to the Board of Trade.*

G. A. S.

In re DUKE OF MARLBOROUGH. DAVIS *v.* WHITEHEAD.

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Jan. 25; *Feb.* 20.

[1892 M. 3603.]

Statute of Frauds (29 *Car.* 2, *c.* 3), *ss.* 7, 8—*Creation or Declaration of Trust of Lands—Assignment of Leasehold by Wife to Husband for Limited Purpose —Intention to re-assign—Assignment absolute in form—Admission of Parol Evidence.*

By an indenture dated in 1890 the Duchess of *M.*, in consideration of natural love and affection, assigned to her husband the Duke a leasehold house belonging to her. The deed was in form an absolute assignment. The Duke subsequently mortgaged the house for the purpose of raising money to pay his debts. The Duchess joined with the Duke in covenanting to pay the mortgage debt, but the equity of redemption was reserved to the Duke alone. Upon the death of the Duke in 1892, the Duchess claimed to be entitled to the house subject to the mortgage. There was evidence that she had assigned the house to the Duke solely to enable him to mortgage it in his own name, and that it was part of the arrangement between them that he should re-assign to her, which, if he had lived, he would have done:—

Held, that the case fell within the authorities which forbid the *Statute of Frauds* to be used to cover what would amount to a fraud, and consequently that the statute could not be successfully pleaded in opposition to the claim of the Duchess.

THIS was a creditor's action for the administration of the estate of the late Duke of *Marlborough*, who died on the 9th of November, 1892.

The Defendants were Mr. *Spencer Whitehead* and *Lily Warren Spencer Churchill*, Duchess of *Marlborough*, who by the will of the Duke, dated the 11th of June, 1889, were appointed executors and trustees thereof.

By the judgment pronounced in Chambers on the 20th of February, 1893, the following inquiry (*inter alia*) was directed: "(5) An enquiry whether the leasehold house known as 3, *Carlton House Terrace*, in the County of *Middlesex*, belongs to the Defendant the Duchess of *Marlborough* absolutely or forms part of the testator's outstanding personal estate." Evidence was gone into in Chambers on this inquiry, and the matter was adjourned into Court before certificate. The evidence shewed

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that the Duke and Duchess were married in June, 1888, in *New York*. About the same time the leasehold house in question was bought at the price of £20,000, which was paid by the Duchess out of her separate estate, and the lease was assigned to her by deed dated the 19th of February, 1889. In the autumn of 1889 and in the beginning of 1890 the Duke was desirous of raising a sum of money to pay off pressing debts, but found difficulty in so doing. The Duchess stated in her affidavit that in the early part of 1890 she consented to allow him to borrow on the security of her house, but it was agreed between them that the mortgage should not be taken in her own name. In paragraph 5 she stated as follows: "Accordingly after discussion with my husband we arranged that I should assign the house 3, *Carlton House Terrace*, into his name in order that he might borrow money upon it, and that it could not therefore leak out that I had been borrowing money upon it as, on the face of it, it would have appeared had the borrowing of the money for my husband on the house been made in my name. Accordingly I instructed Mr. *Whitehead* my solicitor to prepare an assignment of 3, *Carlton House Terrace*, for me into the name of my husband. This was done and I executed such assignment which bears date the 5th of May, 1890." This deed was in form an absolute assignment of the lease to the Duke, and was expressed to be made in consideration of the natural love and affection which the Duchess bore to the Duke, and the Duke thereby covenanted to pay the rents and perform the covenants reserved by and contained in the lease.

By a deed dated the 6th of June, 1890, the Duke executed an assignment of the lease by way of mortgage to the *Crown Life Assurance Office*, to secure the repayment of a sum of £16,000 advanced by the company to the Duke. In this mortgage the Duchess joined and covenanted for the payment of the mortgage debt; but the equity of redemption was reserved to the Duke alone. Paragraph 7 of the Duchess's affidavit was as follows: "It was never intended between us that I should part with the house, but the agreement was that it should be transferred to my husband simply and solely to enable him to borrow a sum of money upon it, and that

subject to the mortgage the house should remain mine. The matter was mentioned between us at subsequent dates, and the question of re-assignment to me was mentioned on several occasions, and it was always intended by both of us that it should be carried out." In paragraph 8 she said: "I particularly recollect one interview that took place between my husband and Mr. *Whitehead* and myself at 3, *Carlton House Terrace*, in the autumn of 1890, prior to Mr. *Whitehead* going to *America* on my business, which he did that autumn. At that interview the business to be done in *New York* was discussed, and amongst other matters the question of the assignment and mortgage of 3, *Carlton House Terrace*, was discussed. My husband told Mr. *Whitehead* in my presence that the house had been transferred into his name by me to enable him to borrow money upon it, and that the house belonged to me and would be re-assigned to me." The Duchess was cross-examined upon her affidavit, and in such cross-examination she said: "My husband would not allow me to borrow money in *England* on the house, on account of my financial position in *America*. It was at my suggestion that the house was assigned to the late Duke in order that he might borrow money on it; but the understanding was that the house was mine. That was a matter entirely between the late Duke and myself, and no one else. Instructions were then given to solicitors to carry out the matter, but whether they were given by me in the presence of the late Duke or not I cannot say. Either the late Duke or I gave the necessary instructions." On being referred to paragraph 8 of her affidavit she said: "That was the first instance in which, so far as I know, either the Duke or I told Mr. *Whitehead* that the house was not to be given as a gift to the Duke. To the best of my knowledge there was no writing between the late Duke and me relative to the assignment. The arrangement was unquestionably that, subject to the £16,000, the house was to come back to me. The only idea was that the house was mine and the debt his. I know my husband wanted the house free for me. My husband expected to make a great deal of money, but he did not live to do so. I have often heard him say that the first thing he would do would be to free our house. I could have called upon my

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husband to pay off the £16,000, but I never should have done so. That matter of his liability to pay off the £16,000 was never discussed between us." She further said that she never told Mr. *Whitehead* up to the time of her husband's death that the house was to be re-assigned to her. And on further cross-examination she said: "Mr. *Milward* was not throughout the transaction relative to the house the private solicitor either to me or the late Duke. Mr. *Milward* frequently pointed out to me in the presence of the late Duke the necessity for re-assigning the house. He was told both by me and the late Duke that the matter would receive attention when pecuniary transactions then in course of negotiation were completed." Mr. *Whitehead* in an affidavit filed by him stated as follows: "In the autumn of 1890 it was decided that I should go to *New York* on the Duchess's business, and some little time prior to my doing so the Duke of *Marlborough* called at my office, and we had a general discussion on various businesses in which he was interested, and also with reference to my journey to *America*. In the course of the conversation the question of the mortgage on *Carlton House Terrace* came up, and the Duke told me that the house had been assigned into his name by the Duchess, in order that he might borrow a loan thereon, but that it belonged to her. At a subsequent date I was at 3, *Carlton House Terrace*, in consultation with the Duke and Duchess with reference to my journey to *America*, and the course I should take over there on various matters, and the course I should take with the trustees of the Duchess and their advisers, and with friends of the Duchess in *New York*. Amongst other things came up the question of 3, *Carlton House Terrace*, and the mortgage thereon, and the Duke again referred to the house having been put into his name to enable him to borrow money, and stated that it belonged to the Duchess. He told me if the question arose to so inform some of the parties in *New York*. I then suggested that the house might be transferred back into the Duchess's name subject to the mortgage, and the Duke said he thought this had better be done, but there was no immediate pressure and the matter was allowed to go on, and in fact it has never been done." On cross-examination he said: "The Duchess told

me that she wished the house assigned to her husband. That came entirely from her. She gave me no reason why she required the transfer. The Duke was then in pecuniary straits. On the 3rd of January, 1890, I was discussing with her Grace the negotiations in connection with the *Law Guarantee Society*. The Duchess said she wished to have the house transferred to the Duke. I rather remonstrated with her because I did not like, acting as her solicitor, that she should part with her property. I remember her replying; it was to the following effect, 'I knew you would say that, Mr. *Whitehead*; but there are reasons why I wanted it transferred into his name, and I have quite made up my mind.'" Then he stated that the question of the re-assignment was discussed between the late Duke and the Duchess and himself at *Carlton House Terrace* in the autumn of 1890, that being the interview referred to by the Duchess in her evidence.

Buckley, Q.C., and *Vernon R. Smith*, for the Plaintiff:—

The Duchess has not made out her claim, and the house must be treated as forming part of the late Duke's estate. If there is any trust it must be evidenced by writing: *Statute of Frauds* (29 Car. 2, c. 3), s. 7. The assignment was for valuable consideration: *Price* v. *Jenkins* (1); so that there is no question of resulting trust, and sect. 8 does not apply. That being so, the case is governed by *Leman* v. *Whitley* (2). There are, no doubt, authorities which have qualified that. If a deed has been obtained by fraud or mistake, then parol evidence may be admitted to shew that the transaction was not what the deed purports it to be: *Lord Irnham* v. *Child* (3) and *Cripps* v. *Jee* (4). In *Bartlett* v. *Pickersgill* (5), however, it was held that parol evidence could not be admitted to shew that a party having agreed for the purchase of an estate in his own name had in fact purchased it on behalf of another. No doubt that case was somewhat adversely commented upon in *Heard* v. *Pilley* (6); but it was declared to be still a binding authority in *James* v.

(1) 5 Ch. D. 619.
(2) 4 Russ. 423.
(3) 1 Bro. C. C. 92.
(4) 4 Bro. C. C. 472.
(5) 1 Cox, 15.
(6) Law Rep. 4 Ch. 548.

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Smith (1). In *Haigh* v. *Kaye* (2) it was held that the statute could not be used by the defendant to cover a fraudulent act; but there the defendant had taken the case out of the statute by his own admission that the deed did not represent the real transaction. In *Childers* v. *Childers* (3) the defence of the statute was held to be excluded by a letter contemporaneous with the deed and written by the plaintiff, shewing that the deed did not represent the real transaction. *Lincoln* v. *Wright* (4) is no doubt against us; but we submit that what was said there was merely *dictum*, the decision being based upon part performance. *Davies* v. *Otty* (5) was decided on the 8th section, and is, therefore, no authority on the general question. And in *Booth* v. *Turle* (6), again, the deed did not represent the real transaction between the parties. If the deed does accurately represent the real transaction, then you cannot go behind it by parol.

Supposing, however, that we cannot plead the statute, then we say, upon the evidence of the Duchess herself, the property was assigned to the Duke for the purpose of enabling him to incumber it, and there was no equity of redemption reserved to her. She never could, at any time, have insisted upon his re-conveying to her. She practically gave the house to the Duke's creditors, and not to him, and there was no definite right reserved to her to get it back. In order to succeed she must shew a definite agreement between herself and the Duke. The borrowing was not to be confined to one loan. The Duchess could not have complained if the Duke had mortgaged the property to its utmost value.

Grosvenor Woods, Q.C., and *W. C. Druce*, for the present Duke of *Marlborough*, who was a legatee under the will and had obtained leave to attend the proceedings upon the inquiry:—

The Duke does not desire to set up the defence of the statute. The late Duke was, under the arrangement between him and the Duchess, to be at liberty to mortgage the house, and the equity of redemption was to belong to her. She, of course, is not entitled to have the property exonerated from the mortgage debt.

(1) [1891] 1 Ch. 384.
(2) Law Rep. 7 Ch. 469.
(3) 1 De G. & J. 482.
(4) 4 De G. & J. 16.
(5) 35 Beav. 208.
(6) Law Rep. 16 Eq. 182.

[STIRLING, J.:—Does the Duchess claim that?]

Yes; but the point does not now arise, the mortgage being still outstanding.

Hastings, Q.C., and *Macnaghten*, for the Duchess:—

Where the Court is persuaded that it is not honest for the party relying upon the statute to keep the property, then the statute is no defence. It is not conceivable that the Duke himself could have set up the defence of the statute. It cannot be set up to cover a fraud, the fraud being not in the deed, but in relying upon it to give effect to something which was not the real intention of the parties.

Leman v. *Whitley* (1) is doubted in *Sugden* on Vendors and Purchasers (2). It is not disputed that the Duchess bought the house out of her own money. She lent it to the Duke to raise money upon it. There was only to be one loan, and, subject to that, the house was still to remain the property of the Duchess. If the Duchess had brought an action against the late Duke to have the house re-conveyed to her, he could not have pleaded the statute. *Lincoln* v. *Wright* (3) is conclusive on the point. The question for the Court is: Is it honest to set up the deed as representing the real transaction? There can be only one answer to that. It was clearly never intended that the Duke should keep the house as his own, and the statute cannot be pleaded.

Lord Irnham v. *Child* (4) cannot be good law if it is intended to lay down that a person who has taken an absolute conveyance can keep the property for himself, although the real intention was that the beneficial interest should not be in him, but in another. A person who insists upon a deed as representing a transaction, which in fact it does not, is committing a fraud, and cannot plead the statute in order to cover that fraud: *Booth* v. *Turle* (5).

In *Childers* v. *Childers* (6) there was, no doubt, a contemporaneous letter setting out the true transaction, and that was relied upon by *Knight Bruce*, L.J., but *Turner*, L.J., clearly says that he

(1) 4 Russ. 423.
(2) 14th Ed. p. 702.
(3) 4 De G. & J. 16.
(4) 1 Bro. C. C. 92.
(5) Law Rep. 16 Eq. 188.
(6) 1 De G. & J. 482.

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would have arrived at the same conclusion without it. If it is established upon the evidence that the Duke was not intended to keep the property, the fact of the deed being absolute in form does not enable any one claiming under him to set up the plea of the statute.

We do not admit that the deed can be supported as a conveyance for value, although, no doubt, Mr. Justice *Kekewich* has held that *Price* v. *Jenkins* (1) is still good law: *Harris* v. *Tubb* (2).

Beale, Q.C., and *Blackwell*, for Mr. *Whitehead*, took no part in the argument.

Buckley, in reply:—

There is no case in which it has been held that *Leman* v. *Whitley* (3), *Lord Irnham* v. *Child* (4), and *Bartlett* v. *Pickersgill* (5) are not good law. In *Lincoln* v. *Wright* (6) all these cases were cited, and the learned judges do not observe upon them; consequently they must be treated as binding authorities.

[STIRLING, J.:—In *Lord Irnham* v. *Child* the report is somewhat obscure.]

A trust cannot be established outside the deed in the absence of writing.

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Upon the evidence, it seems to me to be made out that the house was transferred to the Duke simply for the limited purpose of enabling him to borrow money, and that, subject to the mortgage created by him, it was intended that the house should continue to belong to the Duchess; and if the question raised had related to a sum of stock, as, for example, Consols transferred for the like purpose, I should be of opinion that the equity of redemption belonged to the Duchess.

The Plaintiff, however, who represents the creditors of the late Duke, raises the objection, as I think he is within his rights in

(1) 5 Ch. D. 619.
(2) 42 Ch. D. 79.
(3) 4 Russ. 423.
(4) 1 Bro. C. C. 92.
(5) 1 Cox, 15.
(6) 4 De G. & J. 16.

doing, that the evidence with which I have been dealing is rendered inadmissible by the *Statute of Frauds*, sects. 7 and 8. To this it is answered, that to exclude the evidence would be to permit the *Statute of Frauds* to be used to cover a fraud; and the question to be decided is whether, under the circumstances, this is a valid answer to the plea of the statute. The general principle that the statute is not to be used as a protection to fraud has long been recognised by Courts of Equity; but it does not seem to have been always applied in a uniform manner. For the purpose of the present case the most important decisions to be considered are those of *Lord Irnham* v. *Child* (1), *Leman* v. *Whitley* (2), *Lincoln* v. *Wright* (3), and *Haigh* v. *Kaye* (4). *Lord Irnham* v. *Child* was a case of a grant of an annuity. Upon a bill being filed to redeem, suggesting that it was part of the agreement that it should be redeemable, the agreement being left out of the deed, on the idea that if inserted the transaction would be usurious, parol evidence was offered as to this, but was not admitted to contradict the deed, the clause not being charged to have been omitted by fraud. In that case the Lord Chancellor says: "It is admitted that the deed will bind if no fraud is committed, but objected that when a fraud interferes, there the evidence may be introduced. The objection is founded on a great deal of wisdom and good sense. But the question is, if it were always to be admitted, whether it would not be subversive of justice; the Court has held that it would. If the agreement had been varied by fraud, the evidence would be admissible. The argument then must be to impute fraud to the party. The rule of evidence is not subverted, if there is clear proof of fraud. The committing the agreement to writing, is an argument against fraud." Then he passes on to consider the state of facts; and the evidence having been read for the purpose of ascertaining whether such a fraud was established as would make it a ground of equity, the Lord Chancellor says: "As far as the object was to explain the agreement by any other matter, I thought it necessary to look into the bill, to see whether it alleged it to be fraudulent: had the bill been so, I should have

(1) 1 Bro. C. C. 92, 93, 94.
(2) 4 Russ. 423, 426.
(3) 4 De G. & J. 16.
(4) Law Rep. 7 Ch. 469.

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thought myself bound to hear the evidence; and then my duty would be to consider whether it afforded a ground of equity." He then goes on to discuss the frame of the Bill, and he comes to the conclusion that fraud was not sufficiently charged in the bill or made out. The decision is thus explained by Lord *Eldon* in *Marquis of Townshend* v. *Stangroom* (1). "*Lord Irnham* v. *Child* (2)," he says, "went upon an indisputably clear principle: that the parties did not mean to insert in the agreement a provision for redemption; because they were all of one mind, that it would be usurious; and they desired the Court, not to do what they intended, for the insertion of that provision was directly contrary to their intention, but they desired to be put in the same situation, as if they had been better informed, and consequently had a contrary intention. The answer is, they admit, it was not to be in the deed; and why was the Court to insert it; where two risks had occurred to the parties: the danger of usury, and the danger of trusting to the honour of the party."

In *Leman* v. *Whitley* (3) a son conveyed an estate to his father nominally as purchaser, in consideration of a sum of £400, expressed to be paid by the father to the son. Really the father was intended to be a trustee, and the object of the conveyance was, "that the father, who was in better credit than the son, might raise money upon it by way of mortgage, for the use of the son: the father died shortly afterwards and before any money was raised, having by a will, subsequent to the conveyance, made a general devise of all his real estates: the case is within the *Statute of Frauds*, and parol evidence is not admissible to prove the trust; but the son has a lien on the estate as vendor for the apparent consideration, no part of which was paid." The Master of the Rolls, Sir *John Leach*, says: "There can be no doubt of the moral honesty of the claim made by this bill. But the question is, whether the plaintiff can be relieved consistently with the provisions of the *Statute of Frauds*, which, although it may bear hard upon the plaintiff in the particular case, was certainly called for by the public interest. There is here no pretence of fraud, nor is there any misapprehension of the parties

(1) 6 Ves. 328, 332. (2) 1 Bro. C. C. 92.
(3) 4 Russ. 423.

with respect to the effect of the instruments. It was intended that the father should by legal instruments appear to be the legal owner of the estate. There is here no trust arising or resulting by the implication or construction of law." Then, a little later on: "Considering myself bound, therefore, to treat this case as a purchase by the father from the plaintiff, there does, however, arise an equity for the plaintiff, which, consistently with the facts stated and proved, and under the prayer for general relief, he is entitled to claim. It is stated and proved that nc part of the alleged price or consideration of £400 was ever paid by the father to the plaintiff; and the plaintiff therefore, as vendor, has a lien on the estate for this sum of £400; and the decree must be accordingly." I may mention that this case has been questioned by Lord *St. Leonards* in his Treatise on Vendors and Purchasers (1). The next case to which it is necessary to refer is *Lincoln* v. *Wright* (2). There a mortgagee, with a power of sale of real estate, informed *L.*, the mortgagor, that he should sell it for £220 unless more were offered. It was thereupon verbally agreed between the mortgagee and another person, *W.*, that *W.* should buy on the mortgagor's behalf for £230, and have a lien on it for that sum, that the mortgagor should pay interest and continue to occupy the part he then occupied, and that *W.* should receive the rents of the rest to reduce the principal. An offer by *W.* to purchase for £230 was then sent by *L.'s* agent to the mortgagee, who accepted it, and under his power of sale conveyed to *W.'s* infant daughter, by *W.'s* directions; *L.* continued in occupation of the part he was to occupy, and paid interest, *W.* receiving the rents of the rest. This continued for about ten months, when *W.* died. After his death the daughter, by her guardian, brought ejectment, claiming to be absolute owner, and it was held that the *Statute of Frauds* was no defence to a bill by *L.* to enforce the agreement. Lord Justice *Knight Bruce* rested his judgment on the fact that the continuance of the mortgagor in possession after the conveyance being referable only to the verbal agreement, amounted to part performance of that agreement, and excluded the operation of the statute. But he says (3): "I may add, that though I have mentioned

(1) 14th Ed. p. 702. (2) 4 De G. & J. 16. (3) 4 De G. & J. 21, 22.

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part performance alone as a ground for excluding the operation of the *Statute of Frauds*, I am not sure that its operation is not also otherwise excluded in this case." Lord Justice *Turner* distinctly bases his judgment, not on part performance, but on the principle to which I have been referring. He says: "Without reference to the question of part performance, on which I do not think it necessary to give any opinion, I think that the parol evidence is admissible, and is decisive upon the case. The principle of the Court is, that the *Statute of Frauds* was not made to cover fraud. If the real agreement in this case was that as between the plaintiff and *Wright* the transaction should be a mortgage transaction, it is in the eye of this Court a fraud to insist on the conveyance as being absolute, and parol evidence must be admissible to prove the fraud." I may point out that in that case a volunteer claiming under *W.*, who made the bargain, was not allowed to set up the statute. Lastly, in *Haigh* v. *Kaye* (1), "The plaintiff conveyed an estate to the defendant by a deed, in which the conveyance was expressed to be absolute in consideration of a sum of money paid by the defendant; but no purchase-money actually passed." In this respect the case very much resembles *Leman* v. *Whitley* (2): "The plaintiff alleged that he conveyed the estate to the defendant as a trustee for him. The defendant, in his answer, admitted that he gave no consideration for the estate, but stated that the plaintiff made the conveyance fearing that an adverse decision would be made against him in a suit then pending in Chancery; and that it was understood that the defendant should account to the plaintiff for the rents until he could make arrangements for paying the purchase-money, and if no such arrangements could be made, that he should re-convey the estate. The defendant claimed to hold the estate discharged of any trust, and claimed the benefit of the *Statute of Frauds*." Then arose a question whether the transaction was an illegal one, but that was decided adversely to the defendant. On the question of the *Statute of Frauds*, it was held that the statute "could not be pleaded in answer to the plaintiff's claim; and that as the evidence did not establish the existence of any such agreement

(1) Law Rep. 7 Ch. 469. (2) 4 Russ. 423.

as was alleged by the defendant, the defendant must re-convey the estate to the plaintiff." Lord Justice *James*, in dealing with the objection based on the statute, says (1): "The defendant admits that he took the estate upon the most positive agreement to return it; but in another part of his answer he sets up the *Statute of Frauds*, and claims the estate as a right. Now the *Statute of Frauds* no doubt says, that a person claiming under any declaration of trust or confidence must shew that in writing; but the statute goes on to say that no resulting trust, and no trust arising from operation of law, is within that enactment. I apprehend it is clear that the *Statute of Frauds* was never intended to prevent the Court of Equity from giving relief in a case of a plain, clear, and deliberate fraud. The words of Lord Justice *Turner*, in the case of *Lincoln* v. *Wright* (2), where he said, 'The principle of the Court is, that the *Statute of Frauds* was not made to cover fraud,' express a principle upon which this Court has acted in numerous instances, where the Court has refused to allow a man to take advantage of the *Statute of Frauds* to keep another man's property which he has obtained through fraud."

Now, with reference to these cases, I think that *Lord Irnham* v. *Child* (3) does not govern the present case. There the question whether the deed in question should be redeemable or irredeemable was considered by the parties, and the former alternative was deliberately rejected; and if, in the present case, the question whether upon the execution of the deeds of the 5th of May and the 6th of June, 1890, a declaration of trust or re-conveyance of the equity of redemption should be executed, had been raised between the Duke and Duchess, and they had decided that none should be, the cases would have seemed to me to be parallel. But no such question arose until afterwards; and when the true state of things was brought to their attention by their legal adviser, the Duke appears to have expressed his willingness to re-convey.

Leman v. *Whitley* (4) is unquestionably very close to the present case; but the question is whether it ought to be followed having

(1) Law Rep. 7 Ch. 473.
(2) 4 De G. & J. 22.
(3) 1 Bro. C. C. 92.
(4) 4 Russ. 423.

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regard to the subsequent cases to which I have referred. In argument a distinction was drawn between the present case and *Lincoln* v. *Wright* (1), on the ground that in the latter case the deed was put in a form contrary to the intention of the plaintiff. I do not read the judgment of Lord Justice *Turner* in this sense; and, at all events, it appears to me that no such explanation is applicable to *Haigh* v. *Kaye* (2). If the view of the law which prevailed in *Leman* v. *Whitley* (3) had been followed, it seems to me that the plaintiffs ought to have been held entitled, not to a reconveyance, but simply to a lien on the property for £850, the nominal purchase-money. On the other hand, if the view of the law which was adopted by *Haigh* v. *Kaye* had been applied to *Leman* v. *Whitley*, it appears to me that a re-conveyance ought to have been directed. As *Haigh* v. *Kaye* is a more recent decision, and also (as being a decision of the Court of Appeal) of higher authority than *Leman* v. *Whitley*, I consider myself bound to follow the former in preference to the latter. If the late Duke of *Marlborough* had in his lifetime refused to convey the equity of redemption at the request of the Duchess, I think he could not have set up the statute. Nothing of the kind ever happened; on the contrary, the evidence appears to me to shew that he was willing and intended to re-convey, though, unhappily, he put off carrying his expressed intention into effect until it was too late. In my opinion, the Plaintiff, as claiming under him, is in no better position, and I think the inquiry should be answered by finding that the equity of redemption in the leasehold house, No. 3, *Carlton House Terrace*, belongs to the Defendant, the Duchess of *Marlborough*.

Solicitors for Plaintiff: *Lewis & Lewis.*

Solicitors for the present Duke of *Marlborough*: *Milward & Co.*

Solicitor for the Duchess: *G. C. R. Marshall.*

Solicitor for Mr. *Whitehead*: *Spencer Whitehead.*

(1) 4 De G. & J. 16. (2) Law Rep. 7 Ch. 469.
(3) 4 Russ. 423.

G. A. S.

KEITH, PROWSE & CO. *v.* NATIONAL TELEPHONE COMPANY.

KEKEWICH, J.

1894

Jan. 30; *Feb.* 9.

[1894 K. 2.]

Telephone—Hiring Agreement—Cutting off Wire—Injunction—Specific Performance—Landlord and Tenant—Notice determining Tenancy—Holding-over—Acceptance of Rent—Waiver of Notice.

Under an agreement in 1889 the Defendants, a telephone company, supplied to the Plaintiffs the use of a telephone wire and apparatus for three years at a rent payable quarterly. Upon the expiration of the term the parties continued the agreement by mutual consent. On the 30th of December, 1893, being the last day of a quarter, the Defendants gave the Plaintiffs a notice determining the agreement forthwith, and stating their intention to disconnect the wire and remove the apparatus, and at the same time they demanded rent "up to the 31st of December," being one day beyond the quarter. This rent was duly paid to and accepted by the Defendants. Upon a motion by the Plaintiffs for an injunction to restrain the Defendants from interfering with the wire and apparatus:—

Held, that the agreement created the relation of landlord and tenant, and therefore that the acceptance by the Defendants of rent for a day beyond that on which the notice determining the contract was given operated as a waiver of the notice. Accordingly, an injunction was granted restraining the Defendants from acting on their notice.

The rule as to granting an injunction by way of specific performance, considered.

Fothergill v. *Rowland* (1) discussed.

THE Plaintiffs were music publishers, and a principal branch of their business consisted of selling, letting, and booking seats at theatres and other places of public amusement. This branch was very extensive, and was carried on by the Plaintiffs at various places in *London*. Their head office was at No. 48, *Cheapside*, and was connected with the branch offices by private telephone wires, forty-seven in number, supplied and maintained by the Defendants, the *National Telephone Company, Limited*, originally under an agreement between them and the Plaintiffs dated the 14th of October, 1889, at a yearly rental of £11 for each wire. By that agreement, which was in a printed common form adopted by the Defendants and their customers, the

(1) Law Rep. 17 Eq. 132.

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Defendant company agreed, in clause 1, to erect and maintain in working order, subject to the provisions therein contained, the wire therein mentioned and the telephonic apparatus relating thereto. By clause 2 the Plaintiffs, the "renters," agreed to "hire" the wire and apparatus, and to pay for the use of the same as thereinafter mentioned. The agreement then contained, amongst others, the following clauses:—

"7. The company may disconnect, without notice and without prejudice to the other clauses of this agreement, any subscriber whose rent, either for exchange or private wire, or both, is overdue, and such subscriber shall remain liable for his rent, just as if no disconnection had taken place.

"8. If the rent shall be in arrear or unpaid for fourteen days next after the days and times herein appointed for payment of the same, or if there shall be any breach or non-observance of the terms of this agreement by the renter, the company may determine this agreement by notice to the renter sent through the post addressed to him or left for him at the address below, or at any other address to which the said wire or apparatus may have been removed with the consent of the company, and such agreement shall determine as from the time of giving such notice, but such determination shall not prejudice or affect the rights or remedies of the company in respect of anything done or omitted by the renter prior thereto."

10. On the determination of the agreement the renter should surrender to the company the wire and apparatus in as good condition as when received, ordinary wear and tear excepted, and the company might forthwith remove the same, and for that purpose have access at all times through its agents and workmen to the premises of the renter.

11. The agreement was subject to all proper way-leaves, permissions for attachments, poles, and other easements being obtained and retained by the company.

12. The renter covenanted to give every facility in his power in the way of poles, attachments, &c., to the company for running his own wire, and also those of other subscribers to the company's system, whether exchange or private.

Then the Plaintiffs thereby agreed with the company, subject to the above conditions, to pay them the sum of £11 per annum, payable quarterly, not in advance, for each of the private wires, the first payment to be made on the 1st day of October, 1889, for the quarter ending the 30th of September, 1889, and each subsequent payment to be made on the corresponding day in each and every following quarter for the use of the private wires between the Plaintiffs' various addresses. Every new wire, and every disconnection, to be upon a basis of a yearly rental of £11 per wire, and no less a sum than £385 should be payable to the company during any one year for the term of three. "This agreement shall terminate at the end of three years from the 1st of July, 1889." From the 30th of June, 1892, when the three years' term limited by the agreement expired, the agreement was continued by mutual consent, the Plaintiffs continuing to pay the Defendants the same rent on the same quarter-days as before.

On the 29th of December, 1893, the Plaintiffs, having made arrangements with another company for the supply of telephonic communication, gave notice in writing to the Defendants to determine the agreement for the private wires at the expiration of six months from the 31st of December, 1893; whereupon, on Saturday, the 30th of December, the Defendants gave the Plaintiffs notice in writing, purporting to be under clause 8 of the agreement, "forthwith" terminating the agreement, or, in the alternative, "forthwith" terminating the arrangement or agreement then subsisting between them.

That notice was enclosed in a letter of the same date from the Defendants, informing the Plaintiffs that they—the Defendants—would proceed on the Monday morning following—the 1st of January, 1894—to disconnect the wires and remove the instruments, and demanding "the undermentioned payments due to the company in respect of your private wires, which are now considerably in arrear." Then followed a statement of payments due for the quarters ending respectively the 30th of June and the 30th of September, 1893, and of a further payment falling due "on the 31st inst."

Subsequently, in the course of the same day—the 30th—the

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Plaintiffs sent the Defendants a cheque for the whole amount demanded; and the Defendants then gave the Plaintiffs a receipt expressed to be "in full discharge of account for rental of private lines and instruments to the 31st of December, 1893."

On the Monday morning following—the 1st of January, 1894—some of the Defendants' workmen called at the Plaintiffs' head office and expressed their intention of removing the telephonic instruments there and cutting off the wires outside the premises. As the result of this would have been, practically, to suspend the Plaintiffs' business, they immediately, on the same day, issued the writ in this action, and obtained *ex parte* from the Vacation Judge an injunction over the first day of the Hilary Sittings, restraining the Defendants from cutting, disconnecting, removing, or otherwise interfering with any wire which, on the 30th of December, 1893, was used or connected for use as a private wire for telephonic communication for the purposes of the Plaintiffs' business, and then by special leave served the Defendants with a notice of motion, with the writ, to continue the injunction until the judgment or further order.

This motion now came on for hearing.

Warmington, Q.C., and *Waggett*, for the Plaintiffs:—

We submit that the agreement created the relation of landlord and tenant between the parties, and that therefore the case must be governed by the law applicable to such a relation. Applying, then, that law in the first place, the Plaintiffs, after the expiration of the original agreement, held either on a yearly tenancy—as we submit was the case—requiring six months' notice, or, treating the agreement as continued, on a quarterly tenancy requiring three months' notice. This is a tenancy falling within the definition of a "tenement": *Co. Litt.* (1). There is a grant by the Defendants to us of the use of certain appliances belonging to them, and placed upon our premises by our license; and a grant by us to the Defendants of the right or easement to place those appliances upon our premises for our use and for the use of other subscribers. Possibly it might be said that the Plaintiffs are themselves in the position of landlords. But, on the footing

(1) 6 a, 20 a.

that the Defendants are the landlords, their acceptance of rent for the 31st of December—that is, for a day beyond that on which the quarterly rent was due—constituted a waiver of their notice of the 30th; and inasmuch as they could only accept rent for the additional day on the basis of the agreement continuing, they cannot be heard to say that the agreement determined on the previous day. Their acceptance of rent for the 31st is wholly inconsistent with their contention that there is no agreement subsisting. Accordingly, our tenancy cannot now be determined without either a six months', or at all events a three months', notice; and therefore the Defendants are not entitled to cut off the wires.

Renshaw, Q.C., and *W. D. Rawlins*, for the Defendants:—

First, the Plaintiffs are seeking, in substance, specific performance of an agreement for the supply of telephonic communication. But the Court cannot order specific performance of such an agreement; and therefore, according to the settled rule, cannot grant an injunction: *Fothergill* v. *Rowland* (1); *Ryan* v. *Mutual Tontine Westminster Chambers Association* (2).

[KEKEWICH, J.:—There is no doubt about the rule. The Court will not order specific performance unless it can see that by its own process justice can be done.]

Then, secondly, the agreement on which the Plaintiffs profess to sue came to an end on the 30th of December, when we determined it by notice, as we were entitled to do under clause 8. That was only an agreement terminable at will, just as in the case of partners who continue to trade together after the original partnership has expired by effluxion of time; there any partner is at liberty instantly to determine the partnership: *Cox* v. *Willoughby* (3); *Neilson* v. *Mossend Iron Company* (4).

That disposes of the argument that this was a quarterly tenancy requiring three months' notice. The agreement, then, having been determined by notice, the Plaintiffs are merely in the position of a tenant holding over; and it is impossible to say that that creates a continuing tenancy of a yearly character.

(1) Law Rep. 17 Eq. 132.
(2) [1893] 1 Ch. 116, 127.
(3) 13 Ch. D. 863.
(4) 11 App. Cas. 298.

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Such a tenancy is only applicable to land or houses. Then, the mere fact of our having received too much rent—that is, rent for the 31st of December—does not have the effect of waiving the notice of the 30th. The word "forthwith" is sufficient to cover the 31st.

But we submit that this agreement does not create the relation of landlord and tenant at all. The analogy is misleading. All the cases in which an agreement has been set up again by acceptance of rent are cases in which the ordinary relation of landlord and tenant exists, and do not apply to such a case as this, where the intention of the parties was that either should be at liberty to determine the agreement at any time. The mere slip of taking rent for one day more cannot upset the clear contract between the parties. This case is really analogous to that of a contract to supply goods and services; to supply an electric current and also the services of workmen to ensure a constant current: in short, to supply a "*Puck* in fetters." And it is a contract which either party may determine at any time, if the one finds it inconvenient to continue the services, or the other no longer requires them.

Warmington, in reply:—

I am not asking for an injunction by way of specific performance, but to prevent the Defendants committing a trespass.

It is clear that the receipt of "rent" for the 31st of December operated as a waiver of the notice: *Davenport* v. *The Queen* (1).

[KEKEWICH, J.:—That point was fully discussed in *Croft* v. *Lumley* (2).]

That acceptance of rent is a waiver of notice is now part of the general law.

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Many points have been discussed in this case, but I do not find it necessary to deal with more than two. The first question is, whether this is a case in which the Court ought to grant an injunction, if the Plaintiffs otherwise make out their equity,

(1) 3 App. Cas. 115, 131. (2) 6 H. L. C. 672.

having regard to the undoubted fact that it would be impossible for the Court to decree complete specific performance of the whole of this agreement.

The company agreed, in the first paragraph of the agreement, to erect and maintain in working order, subject to provisions, a certain wire and the telephonic apparatus relating thereto. It would be impossible for the Court to supervise a complete performance of that clause of the agreement, and to see to the maintenance of the wire and telephonic apparatus during the period of the agreement; and that, no doubt, raises a difficulty. In *Fothergill* v. *Rowland* (1), the late Master of the Rolls asked for a definition of the cases in which an injunction ought not to be granted, on the ground that specific performance was impossible, and of the cases in which the Court could compel specific performance by injunction; and he said that he had not been able to obtain an answer from counsel; and not only that, but he obtained, he said, "that which altogether commands my assent, namely, that there is no such distinct line to be found in the authorities. I am referred to vague and general propositions —that the rule is that the Court is to find out what it considers convenient, or what will be a case of sufficient importance to authorize the interference of the Court at all, or something of that kind." And then he comments on *Lumley* v. *Wagner* (2), and an earlier case before Lord *Cottenham*, *Heathcote* v. *North Staffordshire Railway Company* (3); but the law is left, notwithstanding the later decisions, in rather an indefinite state. Here it is to be observed that there is no question of erecting the wire and telephonic apparatus; that has all been done. The only question can be about maintenance; and it seems to me that the difficulty of supervising the maintenance ought not to prevent the Court from saying that the company must not cut off the wires. They may not be compellable to maintain the wires and telephonic apparatus—that is to say, damages might be the only remedy for non-compliance with that part of the agreement; but yet the essence of the agreement is, that the wire and telephonic apparatus, being there, shall be open to the

(1) Law Rep. 17 Eq. 132, 141. (2) 1 D. M. & G. 604.
(3) 2 Mac. & G. 100, 112.

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use of the Plaintiffs; and that seems necessarily to go to the root of the whole matter. Analogies are dangerous; and I am far from saying that the analogy which I am going to mention is strictly applicable; but I will take a case which appears to me to be near the present case in principle. Suppose there is an agreement, such as is common in the north of *England*, for the tenancy of manufacturing premises, the lessor providing power which he agrees, for valuable consideration, to provide and maintain in working order, as in the present case. The lessor has the power in some neighbouring building in action, and then, in breach of his agreement not to allow it to get into disorder or disrepair, he threatens to cut off the power. I can hardly believe that the Court would hesitate in such a case to say, "That you shall not do; it is a direct breach of the agreement, and goes to the root of the agreement. Your agreement was to let the premises with the power; and to say that you will cut off the power is such a direct breach of the agreement, and so destroys it, that you ought to be restrained." I think those considerations are enough to get over the difficulty.

Then comes the other question, to which most of the argument was addressed, namely, whether the action of the Defendant company really made it impossible for them to say the agreement is at an end. There was some argument on the question whether this can properly be regarded as a case of landlord and tenant; and the argument went so far as to suggest that the company are not the landlords, but that Messrs. *Keith, Prowse & Co.* are the landlords. To my mind, that is not so. The company erect this wire and telephonic apparatus. It belongs to them; and although it is not the ordinary case of a landlord and tenant of real property, still there is a hire agreement, the word "hire" being actually used, and Messrs *Keith, Prowse & Co.*, who are to have the enjoyment for a consideration of this apparatus, are described as the "renters." To my mind, a case of landlord and tenant as regards these chattels is established.

Then I will assume for the present purpose—though I wish to observe that is an assumption which will require examination—that under clause 8 the company might determine the agreement by notice forthwith, as they did. They determined it

forthwith on the 30th of December. It was argued that "forthwith" might mean "at some future time." I cannot give that grammatical construction to the word. "Forthwith" means "now," "as from this moment," "henceforth"; and the company must be regarded, if they gave the notice under that clause or under any power, as having determined the agreement as from that moment. Then they, at the same time, demand rent up to and including the 31st of December; that rent was paid, and it was accepted as rent. I have the demand and I have the receipt before me. The result was that the company demanded and received rent for a day beyond the time when the agreement was determined. I think it is impossible for them to affirm and disaffirm, to approbate and reprobate, in that way; and, according to the ordinary law relating to landlord and tenant, they must be regarded as having waived or abandoned their equity. I need not refer to many authorities. They are all cited in *Davenport* v. *The Queen* (1), before the Judicial Committee of the Privy Council. Sir *Montague Smith*, who delivered the judgment of their Lordships, refers, in dealing with the point, to *Croft* v. *Lumley* (2) and the older cases.

I think that the company have put it out of their power now to say that the agreement was determined on the 30th of December, because by the receipt of rent for the 31st they have recognised the fact that Messrs. *Keith, Prowse & Co.* were in possession as tenants and liable to pay rent for the use of the apparatus one day after that. It is a small point, but still I must adhere to the law as I understand it. The case has been treated as if the notice were given under clause 8, and that led to a discussion as to what the nature of the tenancy or occupation of the Plaintiffs was at that time. The agreement was an agreement certain for three years from the 1st of July, 1889. Therefore, it would come to a conclusion on the last day of June, 1892. From that time forward Messrs. *Keith, Prowse & Co.* enjoyed and used this apparatus without any new agreement; and not only that, but the rent was paid according to the old agreement. The result was that there was, as it seems to me, as a matter of fact, a holding over upon the terms of the old

(1) 3 App. Cas. 115. (2) 6 H. L. C. 672.

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agreement. I do not mean to decide this point, but I mention it, as my decision on the preceding point might be regarded as implying that now the telephone company might intervene and say, "We determine it to-day—immediately; and we will take care not to ask any rent beyond to-day," and then say they are entitled to immediate entry. That point was not argued sufficiently for me now to pronounce a decision upon it; but my present impression is, that the receipt of rent after the 30th of June, 1892, and the continued occupation by Messrs. *Keith, Prowse & Co.*, constituted a tenancy from year to year, and that therefore an immediate notice to determine is not open to the company. *Keith, Prowse & Co.* took that view, and gave a six months' notice to determine. I am not now saying whether it is right or wrong; but I do not think that the telephone company ought to interfere without that question being submitted to judicial decision. That being so, there really is nothing to be done except this, to restrain the company from interfering with the wires pursuant to the notice which they gave. I am not deciding anything more. That notice I regard as inoperative—that is to say, to the extent of allowing them now to cut off the wires. Accordingly, there will be an injunction until the trial or further order restraining the Defendants from acting on their notice, and the costs of the motion will be costs in the action.

Solicitors: *Reyroux, Phillips, & Golding; W. E. L. Gaine.*

G. I. F. C.

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Feb. 20, 21.

[1893 G. 781.]

Railway Company—Old Act—Purchase of Land—Conveyance—Mines and Minerals, Reservation of—Subjacent Mines—Easement—Right of Support—Alteration of old Railway—Increasing burden of Easement—Mine-owner's right to work Mines—Subsidence of Surface—Purchase of Mines—Compensation—Injunction—Railways Clauses Consolidation Act, 1845 (8 *&* 9 *Vict. c.* 20), *ss.* 78, 79.

In 1830, under the powers of a special Act of 1825, land was conveyed to a tramway company for the purpose of a horse-tramway authorized by the Act, which reserved to the owner of land conveyed the subjacent mines with power to work them, but not so as to injure the tramway. By a special Act of 1855 the tramway was vested in another company thereby incorporated with power to alter the tramway into a railway of the modern type. That Act incorporated the *Railways Clauses Consolidation Act*, 1845, and repealed the Act of 1825, but without prejudice to anything done under it, and to all rights and liabilities which, if the repealing Act were not passed, would be incident to or consequent on anything so done. Under that Act of 1855 a line of railway suitable for locomotive engines and carriages was laid down and worked over the land comprised in the conveyance of 1830.

In 1892, the Defendants, the present owners of the subjacent mines, gave the Plaintiffs, the present owners of the railway, notice under sect. 78 of the *Railways Clauses Consolidation Act* of their intention to work the mines, and, on the Plaintiffs declining to pay compensation, proceeded to work the mines, and in so doing caused subsidences of the surface and railway. Thereupon the Plaintiffs brought an action for an injunction, claiming to be entitled, by virtue of the conveyance of 1830, to an easement or right of support, and to be under no liability to purchase the mines under the *Railways Clauses Consolidation Act*:—

Held, that the Plaintiffs were entitled, under the conveyance, to a right of support from the subjacent mines without payment of compensation; that such right had not been lost by the alteration of the old tramway into a railway; that the Act of 1855 did not operate to alter the express contract entered into in 1830 by the predecessors of the Plaintiffs and Defendants; and that the Plaintiffs were entitled to an injunction.

By a special Act of 1825, 6 Geo. 4, c. civ., the *Duffryn, Llynvi and Porth Cawl Railway Company* was incorporated, with power to purchase land, and to make and maintain "a railway or tramroad passable for waggons and other carriages" in a certain

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district in the county of *Glamorgan*, and to make roads and ways convenient for hauling "waggons and other carriages passing upon the said railway or tramroad with men or horses, or otherwise," and to erect stationary steam engines. Then, after prescribing a form of conveyance on the purchase of land, it was enacted, by sect. 25, that all mines, minerals, coals, stone, or slate under any land taken or purchased by the company should be deemed to be excepted out of such purchase, and might be worked by the owners or lessees thereof under the said lands or any railway or wharves of the company "as if this Act had not passed, but so as nevertheless not to prejudice or to injure such railway, wharves, or other works hereby authorized or directed to be made." The Act also reserved to owners and occupiers of lands through which the railway or tramroad should be made the right of passing over the railway or tramroad without payment of toll; and to the general public to use the same for the conveyance of merchandize upon payment of tolls. The provisions of the Act related only to the traffic of waggons or trains containing merchandize, not passengers, the necessary haulage being supplied by animal power or stationary steam-engines. By an indenture dated the 19th of July, 1830, certain lands in the parish of *Tythegstone*, in the county of *Glamorgan*, were sold and conveyed by the owners, in the prescribed form, and in pursuance of the Act of 1825, to the company for the purposes of that Act, and a railway or tramroad was afterwards constructed across these lands.

By an Act of 1847 the company and its undertaking were amalgamated with and vested in the *Llynvi Valley Railway Company*.

Prior to 1855, the railway or tramroad made over the lands comprised in the conveyance of 1830 was only suitable for, and was in fact only used as, a horse-tramway for the conveyance of merchandize, consisting mainly of coal and other minerals. In that year, with a view to the conversion of the railway or tramroad into a passenger line, the *Llynvi Valley Railway Act*, 1855, was passed. By that Act—after reciting the previous Acts, and that the main line of the *Llynvi Valley Railway Company* had hitherto been used only as a tramroad, and that part of it was

unsuitable for locomotive engines and carriages, and that it was therefore expedient that such part should be abandoned, a new line substituted, and certain extensions made—the *Llynvi Valley Railway Company* was dissolved and, subject as thereinafter provided, the previous Acts were repealed. Then sect. 4 enacted that, "notwithstanding the repeal of the recited Acts, and except only as is by this Act expressly provided, everything before the passing of this Act done or suffered under the recited Acts shall be as valid as if the recited Acts were not repealed, and the repeal thereof and this Act respectively shall accordingly be subject and without prejudice to everything so done or suffered, and to all rights, liabilities, claims, and demands, both present and future, which, if the recited Acts were not repealed and this Act were not passed, would be incident to or consequent on any and everything so done or suffered; and with respect to all such rights, liabilities, claims, and demands, the company by this Act incorporated shall to all intents and purposes represent the company hereby dissolved, and shall be liable, in respect of such rights, liabilities, claims, and demands, to the same extent and in the same manner as the company hereby dissolved was liable: Provided, nevertheless, that the generality of this enactment shall not be restrained by any special and more restricted saving clause in this Act." Then the Act proceeded to re-incorporate the *Llynvi Valley Railway Company*, to define its undertaking, and to vest that undertaking in the re-incorporated company. By sect. 20 the Act incorporated the *Companies Clauses Consolidation Act*, 1845, the *Lands Clauses Consolidation Act*, 1845, and the *Railways Clauses Consolidation Act*, 1845. The Act contained provisions enabling the company to alter existing railways or tramroads by laying down a broad gauge line of railway, suitable for locomotive engines and passenger carriages. The Act was, in short, in the ordinary form of a modern railway Act, and under its powers the old railway was entirely re-constructed as a broad gauge passenger line suitable for locomotive engines.

In 1860 a company called the *Ogmore Valley Railway Company* was amalgamated with the *Llynvi Valley Company*, the amalgamated company being called the *Llynvi and Ogmore Valley*

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Railway Company, which was in its turn amalgamated with the Plaintiffs, the *Great Western Railway Company*, by the *Great Western and Llynvi and Ogmore Railway Companies Amalgamation Act*, 1883, with which Part V. (Amalgamation) of the *Railways Clauses Act*, 1863, was incorporated. Under that Act the railway became part of the *Great Western Railway* broad gauge system.

Prior to that Act the mines and minerals under the lands comprised in the conveyance of 1830, and under the lands adjacent thereto, were worked by the owners and lessees thereof, sufficient supports being left for the horse-tramway. The Defendants, the *Cefn Cribbwr Brick Company*, were the present lessees of the mines and minerals under these lands.

In June, 1892, the Defendants, under sect. 78 of the *Railways Clauses Consolidation Act*, 1845, gave the Plaintiffs notice of their intention to work the mines and minerals under and near the Plaintiffs' railway, but the Plaintiffs declined to treat for the purchase of those mines or minerals or to recognise any claim on the part of the Defendants to compensation in respect thereof.

The Defendants accordingly claimed to be entitled to work these mines and minerals, and proceeded to do so; but the Plaintiffs complained that in such working the Defendants had caused subsidences on and near the Plaintiffs' railway; and in April, 1893, the Plaintiffs commenced this action, claiming an injunction to restrain the Defendants from working the subjacent or adjacent mines and minerals so as to take away or lessen the necessary support for, or so as to injure, the railway.

On the 12th of May, 1893, upon a motion for injunction, the Defendants gave an undertaking not to work any mines or minerals under the Plaintiffs' land until the trial of the action, whereupon the motion was ordered to stand till the trial.

In their statement of defence the Defendants complained that the Plaintiffs were attempting to impose upon them a greater burden of support than was imposed by the old Act of 1825; that the loads carried by the railway since the Act of 1855 were much heavier than those carried on the old horse-tramway, and that of recent years the traffic over the railway had been largely developed and the weight thereof correspondingly increased;

and they asserted that prior to 1855, and long before the Defendants became lessees, the mines and minerals were worked by the then owners and lessees, who, however, in the course of working left sufficient supports for the horse-tramway constructed under the Act of 1825. They also denied having worked so as to prejudice or injure the Plaintiffs' railway, or so as to take away or lessen the necessary support of the Plaintiffs' land and railway; and they insisted that their workings would not have in any way injured or interfered with the railway or works authorized by the old Act of 1825 had the latter remained, and that in any case no such workings had in any way interfered with or affected any right, whether of support or otherwise, to which the Plaintiffs were entitled in respect of their railway or works; that the Defendants' mining operations had been carried on in the proper and usual manner and without negligence; that any subsidence was caused by the increased weight which had recently been carried on the Plaintiffs' railway, and to the escape of water from some old levels which the Defendants had accidentally discovered in January, 1893, and had then opened up. They claimed to be entitled to work the subjacent and adjacent mines free from any restriction except by leaving such support as was necessary for the railway, works and traffic authorized by the Act of 1825.

The action now came on for trial.

The Plaintiffs' engineers deposed in evidence that the subsidences or "crownings-in" were caused entirely by the escape of water and the subsequent removal of the *débris* from the stalls and headings in the old workings; and that this was sufficient to have caused the subsidences even if the old horse-tramway had been in use, and even if there had been no traffic over the workings at all, since subsidences had occurred at distances varying from 120 to 130 feet from the railway. The Defendants' witnesses attributed the subsidences to the increased pressure of traffic upon certain old workings with which the Defendants themselves had had nothing to do; but it was admitted that the Defendants had recently opened up other old workings so as to cause an escape of water therefrom, and had removed the *débris* and loose rubbish from those workings, and that some

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support would have been afforded by the water and *débris* had they been allowed to remain.

Cripps, Q.C., and *Butcher*, for the Plaintiffs:—

Whatever rights we or our predecessors had under the Act of 1825 were preserved to us by the Act of 1855; and the incorporation of the *Railways Clauses Consolidation Act*, 1845, in that Act must be deemed to be subject to these rights. The general Act of 1845 cannot alter the relations that subsisted in 1825, and which were then fixed. The result of the *Amalgamation Acts* is to vest in the Plaintiffs all the rights acquired by their predecessors. If then the rights of the parties are regulated by the Act of 1825, the Plaintiffs are entitled to an injunction, for it is clear that the conveyance of the surface land in 1830 carried with it the right of support, and whether the conveyance was compulsory or voluntary is immaterial: *Caledonian Railway Company* v. *Sprot* (1); *Elliot* v. *North Eastern Railway Company* (2); *London and North Western Railway Company* v. *Evans* (3). Here the evidence shews that the Defendants' workings would have caused the subsidences even if the old horse-tramroad had remained.

Warmington, Q.C., and *T. H. Carson*, for the Defendants:—

We contend that the *Railways Clauses Consolidation Act*, 1845, applies to this case, and that, in default of the company purchasing our mines pursuant to sect. 78, we have the right to work them under sect. 79. The Plaintiffs are now governed by the Act of 1855—which incorporates the *Railways Clauses Act*—and not by the Act of 1825. If they had preserved the old tramroad, then the old rights would no doubt have remained, but in 1855 the Plaintiffs or their predecessors elected to make a new line of a different kind, to which the old state of things was and is inapplicable. The Act of 1855 opened a new chapter in the history of the line, for what had previously been a tramroad company became a railway company; and whereas previously the line carried light loads at long intervals,

(1) 2 Macq. 449; 1 Paters. Sc. App. 633; 2 Jur. (N.S.) 623.

(2) 10 H. L. C. 333.

(3) [1893] 1 Ch. 16.

now it carries heavy loads at short intervals, with increased speed. So that the effect of the Act of 1855 has been to throw an enormously increased burden on the mine-owner. In such a case the law of easements applies. The owner of a dominant tenement cannot throw an increased burden upon the servient tenement by making substantial alterations in the dominant tenement; the effect of the alterations is to destroy the original easement altogether: *Angus* v. *Dalton* (1); *Murchie* v. *Black* (2); *Harvey* v. *Walters* (3). The Plaintiffs, having by the Act of 1855 subjected themselves to a new code, that of the *Railways Clauses Act*, regulating the right of working subjacent mines, cannot now claim the benefit of an ordinary purchaser's implied right of support: *Great Western Railway Company* v. *Bennett* (4); *Pountney* v. *Clayton* (5); and they are bound to pay compensation for preventing us working our minerals: *Midland Railway Company* v. *Checkley* (6); *Knowles & Sons* v. *Lancashire and Yorkshire Railway Company* (7). If the Plaintiffs rely upon the Act of 1825 as giving them the right of support, then the rights given to the public by that Act must continue also; the burden and the benefit of the Act must go together. We claim the right to work our subjacent mines, whatever the result of the working may be upon the Plaintiffs' line, unless the Plaintiffs purchase them under the provisions of the general Act.

KEKEWICH, J.:—

I will not trouble you to reply, Mr. *Cripps*.

The one fact upon which all parties are agreed is that the railway in the particular part with which I have to deal is in a desperate state—that subsidences have occurred which render the traffic so dangerous that extraordinary care has to be used, and that further subsidences are at any rate to be apprehended. What has brought about those subsidences? The argument of the Defendants has been addressed to proving, or inducing me to believe, that the traffic of the railway is not only one of the

(1) 3 Q. B. D. 85, 102.
(2) 19 C. B. (N S.) 190.
(3) Law Rep. 8 C. P. 162, 165–6.
(4) Ibid. 2 H. L. 27.
(5) 11 Q. B. D. 820, 834.
(6) Law Rep. 4 Eq. 19, 27.
(7) 14 App. Cas. 248; 20 Q. B. D 391, 403.

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causes, but the cause—the *causa causans*, the *causa sine quâ non*. The evidence, however, fails to go so far. I do not think that I need discuss the question whether the Plaintiffs have contributed in any way to their own injury, because the contribution, if any, is, according to the evidence, only by way of acceleration. It has not been the actual cause, but has only, at the most, brought about the injury at the particular moment. I adopt the view, applying it to this case, which Lord *Cranworth* expressed in the case of *Caledonian Railway Company* v. *Sprot* (1), on the evidence then before him. He says (2): "First, when Mr. *Sprot* granted his land for the avowed purpose of enabling the disponees to make a railway, without any limitation as to its nature, I think he must be understood to have warranted proper support, however the railway might be used, or to whatever purposes it might be applied." That is his first reason, with which I am not for the moment dealing: "and, secondly, the gentlemen to whom the Court of Session referred this very question expressly say, that neither increased traffic, nor the alteration of the structure, nor uses of the railway have materially affected the practicability of working the minerals."

Adopting Lord *Cranworth's* view, I find upon the evidence that there would have been, in any case, subsidence from the working of the minerals, which subsidence has been probably only a little accelerated, if at all, by the working of the railway, and that therefore it is the working of the minerals which has produced this injury. Are the Defendants responsible for that? They have endeavoured to shew that some injury must have been caused by old workings with which they are not at all concerned. But that is only part of the injury, and it is, to my mind, clear on the evidence that much of it has been caused by old headings into which they have entered, and from which they have removed the *débris* which accumulated during a long series of years, so that those headings were really full. I conclude from the evidence that until they opened those headings the support which they gave to the soil above and around them was, if not actually or mathematically equivalent to the original

(1) 2 Macq. 449; 1 Paters. Sc. App. 633; 2 Jur. (N.S.) 623.
(2) 2 Macq. 462.

support of the original soil, at any rate practically sufficient for all purposes. They tapped those headings for their own purposes, and the result is that they brought down the soil, and will probably bring it down much more. That opinion is strongly fortified by reference to those headings which are entirely outside the line. There we have subsidences in places at 120 or 130 feet from the railway, and it is not suggested that the traffic can have produced any material effect there.

On these short grounds, I think that the injury, or part of the injury, which has been caused, and part of the injury which is apprehended—which is by far the major part in each case—is due, and will be due, to the workings of the Defendants. They are the successors in title of the grantors to the railway company. Are they in that way responsible as a matter of law? The railway company took under the conveyance of the 19th of July, 1830, and to my mind the words of the conveyance are of no essential importance; but as a matter of fact, the conveyance is expressed to be made pursuant to the Act of 1825. It is a conveyance made to the railway company, purchasing under their statutory powers and taking a statutory title. The 25th section of the Act of 1825 provides that from any conveyance of that kind there shall be excepted all mines, minerals, coals, stone or slate under any land; so that what really was done was this: The vendors conveyed to the railway company a lateral stratum of land, reserving to themselves all other lateral strata beneath that conveyed. Of that, but for the law of support, they would have been absolute owners; they may do as they please there. They may not only work the mines, as has been suggested in argument, but they may use it for any proper purpose, according to the view which was enunciated by Sir *George Jessel* in *Eardley* v. *Granville* (1). He may use it for any purpose whatever, subject to this—that he must not infringe the covenant, whether expressed or implied, into which he has entered with the railway company to provide proper support. The 25th section of the Act of 1825 does express that to some extent. It gives power to the vendors to work the minerals (which was scarcely wanted, but in those days the law was not

(1) 3 Ch. D. 826.

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so settled as it is now), and then says: "as if this Act had not passed, but so as nevertheless not to prejudice or to injure such railway, wharves, or other works hereby authorized or directed to be made." It did not refer to the adjacent land; that was not in the contemplation of the parties. The common law right of support by the adjacent land is not touched upon and is not interfered with. That seems entirely in accordance with the case of *Caledonian Railway Company* v. *Sprot* (1), and many other cases, some of which have been referred to in the argument.

But then it is said that the right of support is taken away from the Plaintiffs, or that they are not entitled to the benefit of it, for two reasons: In the first place, that they have entirely changed their rails from what was a horse-tramroad into part of the large system of the *Great Western Railway Company*, which is worked by steam engines of modern construction, with carriages and trucks of very great weight; and that there is an entirely different system in use. As regards the effect of the traffic on the soil beneath and the actual support required, I have referred to that, and do not mean to refer to it again. In what way other than that have the Plaintiffs prejudiced their case by the alteration? Of course the alteration was not contemplated in 1825, and was not contemplated for many years later; but when vendors make a bargain of that nature and take the best sum they can get for the property they sell, they must run risks of the kind which Lord Justice *Bowen* points out in the case of *London and North Western Railway Company* v. *Evans* (2), which seems to me to be directly applicable. He says: "It is true that at the date of the Act the minerals were not thought to be of value, and were not taken into account in assessing the actual compensation exacted. But if the right of support was not substantially measured in the price given for the lands taken and used, it might have been demanded and estimated in the price, had the owners been sufficiently prescient; and after this length of time it must be assumed that all was paid for which was capable of calculation or measurement and which was thought worth claiming by the owners, and that all conditions

(1) 2 Macq. 449; 1 Paters. Sc. App. 633; 2 Jur. (N.S.) 623.
(2) [1893] 1 Ch. 29.

precedent have been fulfilled which were requisite to give the canal proprietors the right to the necessary support for the maintenance and making of their canal." If these vendors had been wise enough to anticipate steam-power for locomotion and heavy carriages and trucks, they perhaps would have asked something more than the comparatively small sum which was paid to them. We cannot go into that, but what was paid to them may have been a very large and excessive value for the surface of the soil which they sold. At any rate, they made their bargain, and I see no reason for saying that, because the land has since been used in a somewhat different way, therefore the right to support is gone. It is used in a similar character—it is a railway—and I think it would be straining the doctrine which has been laid down in some cases cited for the Defendants as to the law of easements to say that, because a new science has introduced new methods of user, therefore the right to support is lost.

Then there is another answer, which is this: Time has gone on, and the Legislature saw fit in 1845 to introduce what has been called a code for the government of railway companies and mine-owners in the *Railways Clauses Consolidation Act* of that year, and it is said that the present Plaintiffs are bound by that. They are the successors in title of the original railway company, and, it is said, they have really purchased under that Act. The Act of 1855 is the substantial Act upon which this argument depends, and no doubt from that time forward, and for some purposes earlier, but at any rate from that time forward, the railway company is governed by the *Railways Clauses Consolidation Act*, so far as it is applicable to any particular case. In taking further property, or in making further bargains for the acquisition of land or minerals, of course it would apply; and for many other purposes having no concern with minerals at all the Act would apply. But what I am asked to hold is, that it applies to alter an express contract entered into in 1825 between the railway company or their predecessors in title and the vendors, without the matter having been gone into before Parliament, and without anything which anyone can put his finger upon as containing even an express or implied condition. There is not even a general provision to touch it at all. It seems to

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me that it would be construing an Act of Parliament according to an entirely wrong principle to say that a contract entered into under an Act of Parliament in 1825, and actually concluded in 1830—that is to say, the contract between the railway company and the vendors—is to be altered by an Act of 1855, without any words which can be laid hold of to shew that that was within the contemplation of the Legislature.

There is a further answer beyond that, and that is, that the rights are saved. Though the Act of 1825 is repealed, what is done under the Act is saved on the repealing of the Act; but whether you rely upon the one or the other, the Plaintiffs' case upon that point seems to me to be reasonably clear.

There is only one other point which I need notice. It is said that this Act of 1825 confers very great benefits upon the persons there mentioned, and that the railway company cannot insist on the Act of 1825 as regards the 25th section and the rights contained in their conveyance without giving also the benefits which the Act reserves to those other persons. That seems to me to be entirely beyond my cognisance at the present moment. Who are those persons? They are certain persons, members of the public, and there is nothing whatever that I have seen—and counsel has not called my attention to anything—to shew that anything is reserved to the company's original vendors. The adjoining owners no doubt benefit, not as vendors, but because they are adjoining owners; and other members of the public are to have certain rights of putting their trucks of coals on the tramway—to have access to it, and so forth, either free or on payment of a very small fee, all of which has been done away with by the Act of 1855. But that is not done for the benefit of these vendors. It is not part of the contract contained in this conveyance. The provisions are made for the benefit of the public, and it is not necessary, therefore, for me to say any more. But as a matter of fact it has seemed good to Parliament to repeal all that. Those are contracts with the public; and we know that Parliament is not in the habit of requiring all persons interested in such matters to appear before them. Parliament legislates for the benefit of the public—for the railway company on the one hand and for the public on the other—but when the

Bill threatens interference with private rights, then the private person interested has a *locus standi*, and is entitled to oppose the Bill. Here there is nothing of that kind. These vendors, predecessors in title of the Defendants, are not protected in any way by the Act of 1825. It may happen that they fill other positions in which they might have some claim, but in that particular character they seem to me to have none.

I think I have now exhausted all the points which have been made on behalf of the Defendants, and in my view they all fail and the Plaintiffs, therefore, are entitled to the relief which they ask, with the costs of the action.

As regards damages, it has been agreed that I shall not deal with the matter, and there must be a reference. Probably the parties will agree to refer it to some person, but I desire that it should go to the referee, whoever he is, quite free from any opinion on my part, because I have formed none, concerning the extent to which the Defendants are liable. All I say is that they are liable to some extent, and that therefore they must be restrained; and they must pay the costs of the action. But when it comes to estimating the damages it may possibly appear that the injury has been caused to a great extent or mainly by the acts of others who worked the minerals before them, and for whom they are not responsible. Possibly also it may have been caused by others who are working in the neighbourhood, and against whom the company may, or may not, have a different case. I therefore wish the matter to go quite as an open reference; and, of course, in the absence of any agreement between the parties, I shall reserve the costs of that reference, because the amount of damages after all recoverable from these Defendants may be small.

Solicitors: *R. R. Nelson; Bompas, Bischoff, Dodgson, Coxe, & Bompas.*

G. I. F. C.

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March 1, 14

SADLER *v.* WORLEY.

[1893 S. 4421.]

Limited Company—Debenture—Floating Security—Equitable Charge—Winding-up—Uncalled Capital—Foreclosure—Form of Judgment.

A debenture of a limited company, in the usual form of a floating security charging all the property of the company, both present and future, including its uncalled capital, confers upon the registered holder, in the event of the debenture becoming immediately payable in consequence of a winding-up, the ordinary mortgagee's remedy by foreclosure against the uncalled capital as well as the other property comprised in the security.

Form of foreclosure judgment on a mortgage debenture.

THE Plaintiff, *Nicholas Sadler*, was the registered holder of nine debentures, dated the 23rd of November, 1891, for £500 each, all carrying interest at 6 per cent., being the whole of the first issue of debentures of the *Iddesleigh Mansions, Limited*, a company incorporated in 1887 under the *Companies Acts*, 1862 to 1883.

By each of the debentures the company agreed to pay, on the 9th of November, 1896, to the registered holder for the time being thereof, the sum of £500, with interest at the rate of 6 per cent. per annum payable quarterly; and the company thereby charged with such payments "all its property, funds, assets, or effects whatsoever and wheresoever, both present and future, including its uncalled capital for the time being, subject to the mortgage of £12,000 now existing, or any mortgage or mortgages created in substitution thereof." The debenture was issued subject to the conditions indorsed thereon, condition 1 being as follows: "This debenture is one of a series of debentures each for securing the principal sum of £500 issued or about to be issued by the company. The debentures of this issue are to rank *pari passu*, subject as within mentioned, as a charge on the property hereby charged, and so that such charge shall be a floating security." Condition 4 was as follows: "The principal money hereby secured shall immediately become payable if (*a*)

the company makes default for a period of one calendar month in the payment of any interest hereby secured, and the registered holder hereof, before such interest is paid, by notice in writing to the company calls in such principal money; or (*b*) an order is made or an effective resolution is passed for the winding up of the company."

The principal and most valuable property of the company comprised in the debentures consisted of a leasehold block of buildings in *Westminster* called the *Iddesleigh Mansions*, held for a term of ninety-nine years; but it was subject to a prior mortgage to secure £12,000 and interest, dated the 23rd of November, 1891.

Interest was paid to the Plaintiff up to the 9th of February, 1893, one of the quarterly days of payment, when it ceased to be paid; and on the 8th of November, 1893, at an extraordinary general meeting of the company, a resolution was passed to wind up the company voluntarily, and a liquidator was appointed.

This was an originating summons taken out by the Plaintiff against debenture-holders of the second and third issues, and against the company, asking that an account might be taken of what was due to him for principal, interest, and costs on his nine debentures, and that the debentures might be enforced by foreclosure or sale; for possession, and for a receiver and manager.

Bramwell Davis, for the Plaintiff, asked for an order for foreclosure.

Eve, for the Defendants, debenture-holders of the second and third issues:—

Having regard to the nature of the property charged by the debentures, especially the uncalled capital, foreclosure is not possible. The Plaintiff, having nothing more than an equitable charge, is only entitled to a sale: *Ross* v. *Army and Navy Hotel Company* (1); *Blaker* v. *Herts and Essex Waterworks Company* (2); *Tennant* v. *Trenchard* (3); *Carter* v. *Wake* (4). In any case, I ought to have liberty to apply for a sale.

(1) 34 Ch. D. 43.
(2) 41 Ch. D. 399, 407.
(3) Law Rep. 4 Ch. 537, 542.
(4) 4 Ch. D. 605.

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Bramwell Davis, in reply:—

I am at all events entitled to foreclosure as to the company's leasehold property; and I submit that, on principle, I am entitled to foreclosure also as regards the uncalled capital and all other items comprised in my security. It is clear that the uncalled capital of a company is a proper subject for a mortgage: *In re Pyle Works* (1); and if so, the mortgagee, whether his mortgage is legal or only equitable, is entitled to his ordinary remedies: *Fisher* on Mortgages (2). There is no difference, in principle, between a mortgage or charge of unpaid capital, or of a future debt, or of any ordinary *chose in action*: *General Credit and Discount Company* v. *Glegg* (3); *Slade* v. *Rigg* (4); *Wayne* v. *Hanham* (5). In *James* v. *James* (6), it was held that the relief to which an equitable mortgagee, by deposit of title deeds, is entitled, is foreclosure and not merely sale. The recognised forms of a foreclosure decree are applicable to an equitable mortgage of uncalled capital: *Seton* on Decrees (7). *Tennant* v. *Trenchard* (8) and *Carter* v. *Wake* (9) are commented on in *Seton* (10).

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The plurality of debentures may, in some cases, be a matter of importance, as where one debenture-holder purports to sue on behalf of all, or other debenture-holders are before the Court but do not support the plaintiff; but in this case it is a matter of absolute indifference. All the debentures of the first series are held by the Plaintiff, and his position is the same as if a single debenture had been issued to him.

Again, these are the debentures of a company incorporated under the *Companies Act*, 1862, and I am not troubled with the authority of *Blaker* v. *Herts and Essex Waterworks Company* (11), or the principle laid down in *Gardner* v. *London, Chatham, and Dover Railway Company* (12), on which that authority proceeded.

(1) 44 Ch. D. 534.
(2) 4th Ed. p. 484.
(3) 22 Ch. D. 549.
(4) 3 Hare, 35.
(5) 9 Hare, 62.
(6) Law Rep. 16 Eq. 153.
(7) 5th Ed. vol. ii. p. 1659, Form 1; p. 1695, Form 3; p. 1701, Form 14.
(8) Law Rep. 4 Ch. 537.
(9) 4 Ch. D. 605.
(10) 5th Ed. vol. ii. p. 1705.
(11) 41 Ch. D. 399.
(12) Law Rep. 2 Ch. 201.

The Plaintiff's debentures are in a form now familiar as that of a floating charge, and the amount thereby secured is expressed to be charged by the company on "all its property, funds, assets, or effects whatsoever and wheresoever, both present and future, including its uncalled capital for the time being, subject to the mortgage for £12,000 now existing, or any mortgage or mortgages created in substitution thereof." The floating character of the charge ceased, according to the fourth condition indorsed on the debentures, on the 8th of November, 1893, when an extraordinary resolution was passed for the voluntary winding-up of the company. On that day the subject of the charge, which until then had been necessarily uncertain, was ascertained, and from that time the debentures have been a charge on all the property then existing of the company. I am told that this includes leasehold property—which is the most valuable asset; but apparently there are some other items, and I am not at liberty to consider the case on the hypothesis, which would remove many difficulties, of the leaseholds being the only property available.

Can the remedy by foreclosure be properly applied, not only to the leaseholds, but also to such other items as exist, including in particular the uncalled capital? That is the question for my decision. What is foreclosure? The answer shall be given in the words of Sir *George Jessel* in *Carter* v. *Wake* (1): "The principle upon which the Court acts in the latter case"—a mortgage by deposit of title-deeds—"is, that in a regular legal mortgage there has been an actual conveyance of the legal ownership, and then the Court has interfered to prevent that from having its full effect, and when the ground of interference is gone by the non-payment of the debt, the Court simply removes the stop it has itself put on." That is, in strictness, applicable only to a legal mortgage in the full sense of the term; that is to say, it is not, in strictness, applicable even to an equitable mortgage, such as a puisne mortgage necessarily is, though expressed in legal form; and it is still less applicable to a mortgage by way of charge. Nevertheless, the Court has got over the difficulty where the charge has been made by deposit

(1) 4 Ch. D. 606.

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of title-deeds, and notwithstanding the absence of an accompanying memorandum, with or without an agreement, to execute a legal mortgage. In these cases (using again the words of Sir *George Jessel* in *Carter* v. *Wake* (1)) "the Court treats the deposit of title-deeds as an agreement to execute a legal mortgage, and therefore as carrying with it all the remedies incident to such a mortgage."

It is sometimes stated that the remedy of an equitable mortgage is foreclosure rather than sale; but no distinct authority to this effect was cited to me, and I have found none. There are many authorities that the remedy of an equitable mortgagee by deposit of title-deeds is foreclosure—see, for instance, *James* v. *James* (2)—but they do not extend beyond that particular class.

There are, however, cases in which equitable mortgagees of property other than land have been held entitled to foreclosure. In one case cited in this connection—*General Credit and Discount Company* v. *Glegg* (3)—Vice-Chancellor *Bacon* granted that remedy to lenders on the security of railway shares and debenture stock; but it appears from the report that such shares and stock had been transferred into their names with power of sale, and therefore the authority is scarcely apposite.

There are, however, more pointed instances to be found in *Seton* on Decrees (4); in these cases, the judgment of foreclosure has been perfected by direction—not always actually given, but necessarily consequent—that the mortgagor do make over the mortgaged property to the mortgagee, so as to complete his irredeemable title by legal ownership. One of these (5) deals with a mortgage of a pension, which was apparently assigned to the mortgagees, but in such form that an irrevocable power of attorney to enable them to receive it was required in event of foreclosure, so that something was necessary to complete the legal title, and the mortgage was, in substance, equitable. Another (6) deals with Consols in Court; and the notes (7) mention further cases proceeding on the same lines. In an

(1) 4 Ch. D. 606.
(2) Law Rep. 16 Eq. 153.
(3) 22 Ch. D. 549.
(4) 5th Ed. vol. ii.
(5) Ibid. p. 1661.
(6) Ibid. p. 1659.
(7) 5th Ed. vol. ii. p. 1662, *et seq.*

earlier note (1) it is stated, and I believe with accuracy, that the remedy of a judgment creditor has been, after some conflict of authority, stated to be foreclosure, and not sale.

Is there any good reason why these authorities should not be extended, as apparently they never yet have been, to such a charge as is now under consideration? If there be any adverse principle of law or rule of practice, the question must be answered in the negative; but otherwise it is well to remember that foreclosure is not likely to be asked, and is still less likely to be asked successfully, except where the security is deficient, and that in that class of cases the remedy is peculiarly appropriate, and has a value for the mortgagee which can attach to none other.

Of course, I accept the judgment of Sir *George Jessel* in *Carter* v. *Wake* (2) that foreclosure is not applicable to a pledge of chattels. Perhaps that rule may be found to be inconsistent with some decrees of the Court; but, without pursuing that inquiry, suffice it to say that there is no pledge here. *Tennant* v. *Trenchard* (3) was cited; but the judgment in that case seems to me to proceed entirely on the special character of the contract which made it improper for the trustee to destroy the trust property.

But these are the assets of a company, and some of them cannot be realized except by the exercise of powers which are vested by statute and articles of association in the company itself as represented by directors or liquidator. To take the most extreme and most embarrassing item, how can there be foreclosure of uncalled capital? It cannot be vested in the mortgagee, and the extreme limit of his right must be to have the power of calling on the directors or liquidator to exercise their power on his behalf. This sounds somewhat anomalous. But it must be remembered that a mortgage of uncalled capital can be effectually made; and the decisions sanctioning that would be idle if they did not also sanction the realization of the mortgage security. If it be urged that such realization must be by sale, the answer is that a sale is open to the same objection. Supposing the uncalled capital to be sold and assigned to a purchaser, how is he in any better position than the mortgagee?

(1) 5th Ed. vol. ii. p. 1583. (2) 4 Ch. D. 605.
(3) Law Rep. 4 Ch. 537.

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Or rather, why should he be entitled to means of enjoying his property to which the mortgagee is not?

I am reluctant to make an order the like of which has never been made before. On the other hand, I ought not to hesitate to apply a principle to facts to which it seems to me to be properly applicable merely because it has never yet been so applied. I fail to see why an agreement to execute an assignment on default of payment of the money lent should be implied on a deposit of title-deeds, a policy of insurance: *In re Kerr's Policy* (1), or certificates of shares (which I think has been done, though I have not been able to put my hand on the case), and not to other property, capable as between borrower and lender and according to the reasonable experience of mankind, of being made the subject of similar contracts.

There is this further to be considered. Even if this debenture does not give, one might easily be framed so as to give a right of foreclosure as regards the leasehold property comprised in it; and it would be difficult, I think, to recognise the right of foreclosure as regards part, and to deny it as regards other part, of the property comprised in the same debenture. I will not pursue this thought further now; but, if ever it has to be pursued, the doctrine of the Court as to opening foreclosure must be borne in mind.

On the whole, I am of opinion that there should be an order declaring the Plaintiff entitled to foreclosure, and directing the company, at the Plaintiff's request, to assign to him the several items of property comprised in the debentures. This will require some little consideration in detail. Of course, the order must follow, as far as possible, the usual form, and provide for redemption by any parties entitled to redeem. Mr. *Eve*, on behalf of holders of debentures of the second series, intimated that, though not now prepared to apply for a sale, he might wish to do so at a later stage. This it seems he can do without special reservation of liberty to apply for that purpose, which, therefore, I do not propose to insert; but he must take warning that his application can only be granted, if at all, upon fair terms to the Plaintiff, on the principle of *Woolley* v. *Colman* (2).

(1) Law Rep. 8 Eq. 331. (2) 21 Ch. D. 169.

In the judgment, as drawn up and entered, the operative part was in the following form:—

"This Court doth declare that the Plaintiff, as the holder of nine mortgage debentures for £500 each, dated the 23rd of November, 1891, and forming an issue of £4500 first mortgage debentures of the Defendant company, is entitled to a charge on all the property, funds, assets or effects of the Defendant company, including its uncalled capital, as the same existed on the 8th of November, 1893 (the date of the resolution to wind up the Defendant company), subject to any charges on specific parts thereof created previously to that date and then subsisting, for securing the repayment of the principal moneys and interest on the said mortgage debentures. And it is ordered that the following account and inquiry be taken and made, viz.: 1. An account of what is due for principal and interest to the Plaintiff, as the holder of all the said mortgage debentures, on the security thereof, and for his costs of this action, to be taxed by the Taxing Master; 2. An inquiry what property, assets or effects of the Defendant company are comprised in the said mortgage debentures and the charge or security thereby created, and in whom the same are now vested. And it is ordered that, upon the Defendants, or any of them, paying to the Plaintiff what shall be certified to be due to him as aforesaid within six months from the date of the Chief Clerk's certificate at such time and place as shall be thereby appointed, the Plaintiff do deliver up (upon oath, if required) the said debentures, and all deeds and writings in his custody or power relating thereto, to the Defendants, or to such of them as shall redeem the mortgaged hereditaments and premises, or as he or they shall direct; and in case the Defendants, or any of them, shall so redeem the Plaintiff, the Defendant or Defendants so redeeming is or are to be at liberty to apply to this Court, as he or they may be advised; and on such application it is not to be incumbent on the Defendant or Defendants so applying to give the Plaintiff notice thereof: and this judgment is without prejudice to any question which may arise as to the rights or interests of the Defendants as between themselves in or to the said property. But in default of the Defendants, or some or one of them, paying to the Plaintiff what shall be certified to be due to him as aforesaid by the time aforesaid, This Court doth declare that the Plaintiff will be entitled to the hereditaments and premises comprised in the said debentures, free and clear of and from all right, title, interest and equity of redemption of, in and to the said premises, and to have an absolute conveyance. And it is ordered that in such case the Defendant company, and the liquidators thereof for the time being, do all such acts, and execute all such conveyances and deeds, as may be necessary for vesting in the Plaintiff the said mortgaged property, such conveyances and deeds to be settled by the Judge in case the parties differ. And any of the parties are to be at liberty to apply to this Court generally as they may be advised."

Solicitors: *Hughes, Hooker & Co.; Poole & Robinson.*

G. I. F. C.

ROMER, J.
1894
Feb. 23.

MINEHEAD LOCAL BOARD *v.* LUTTRELL.

[1893 M. 738.]

Local Government—Sewer constructed by Landowner for his own Profit—Vesting in Local Authority—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 13, *sub-s.* 1.

By sect. 13 of the *Public Health Act,* 1875, "all existing and future sewers within the district of a local authority . . . . except (1.) sewers made by any person for his own profit . . . . shall vest in and be under the control of such local authority":—

Held, that sewers made by a landowner for the purpose of draining a town, the greater part of which stood on his lands, and for the use of which sewers he levied and was paid a sewer rate by all persons whose houses were connected with his sewers, were sewers made by him "for his own profit" within the meaning of the above exception, and that, consequently, such sewers did not vest in the local authority.

THIS was an action by the urban sanitary authority for the local government district of *Minehead,* in the county of *Somerset,* which was constituted in the year 1891, claiming a declaration that the system of sewerage for draining the town of *Minehead* was now vested in them, and an injunction to restrain the Defendant from trespassing upon or interfering with the sewers.

Previously to the year 1878, no system of sewerage or drainage existed in the town of *Minehead,* and in that year many complaints as to the unsanitary condition of the town were made by the inhabitants to the Defendant, who was lord of the manor of *Minehead,* and largely interested in the development and prosperity of the town and the owner in fee simple of most of the lands on which the town was erected. At that time the town comprised some 300 houses, which were held and occupied as follows:—

(*a*) Some of the houses were in possession of the Defendant as owner thereof in fee simple.

(*b*) Some of the houses were in the possession or occupation of tenants of the Defendant under building leases for long terms of years.

(*c*) Some of the houses were in the occupation of tenants from year to year under agreements with the Defendant.

(*d*) Some of the houses were held by divers grantees in fee simple from the Defendant, subject to perpetual rent-charges issuing thereout.

(*e*) As to one house, the Defendant and two other persons were tenants in common in fee simple in equal shares.

The Defendant accordingly, in the year 1878, constructed at his own expense and with the sanction of the then local authority, a system of sewerage for effectually draining the town, and he subsequently extended the system of sewerage to new streets in the town as the same were from time to time made. Immediately the system of sewerage was constructed, the greater number of the houses were connected therewith, and the sewers had been in effective operation ever since. The sewers for about four-fifths of their length traversed all the principal roads and streets in the town (which were public highways), and as to the remaining one-fifth of their length were under the land of the Defendant, and had their outfall on the foreshore of the *Bristol Channel* immediately above low-water mark. The Defendant also constructed in connection with the sewers at his own expense and on his own land certain tanks at suitable positions into which the water from certain small streams was allowed to flow, and every ten days was discharged through the sewers for the purpose of flushing the same. The total amount expended by the Defendant in constructing this sewerage system was about £5000, and he levied and was paid by the grantees, lessees, and tenants occupying houses drained thereby certain small annual payments as a voluntary sewer rate. The amount received by the Defendant in respect of this sewer rate varied from year to year, but in no year exceeded £183.

A small part of the town of *Minehead* belonged to another owner, who, in the year 1881, at his own expense, constructed sewers for draining his property, and by an arrangement with the Defendant connected his sewers with the sewerage system of the Defendant in consideration of certain annual payments called a sewers rate to be levied on the occupiers of such last-mentioned property.

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The Plaintiffs claimed that the sewerage system and flushing tanks of the Defendant were now vested in them as the local authority of the district of *Minehead.*

The Defendant denied the title of the Plaintiffs, and alleged that the sewerage system and tanks constructed by him were constructed for his own profit, and for no other purpose whatsoever.

Haldane, Q.C., and *St. J. Clerke,* for the Plaintiffs:—

The question turns on the 13th section of the *Public Health Act,* 1875. This was not a sewer made by the Defendant for his own profit within the meaning of the exception. He was the owner of almost the whole area drained by these sewers, and what he did was really for the benefit and advantage of his own property and to develop the town. The cases shew that the profit accruing to the owner from the increased value of his property by reason of its being properly drained will not bring the case within the exception: *Acton Local Board* v. *Batten* (1); *Bonella* v. *Twickenham Local Board of Health* (2). To come within the exception it must be a sewer not made for the mere purpose of drainage, but a sewer made for a purpose above, beyond, and independent of any sanitary purpose: *Ferrand* v. *Hallas Land and Building Company* (3). Now, here the Defendant was advised that either the local authority must do the work, in which case the greater part of the cost would, under sect. 70 of the Act, fall on himself, or that he must do it himself. He chose the latter alternative. No doubt he contemplated recovering some sort of contribution from his lessees and tenants in the shape of a rate; but he made no contract with any of them previous to constructing the sewers; and he had no legal power to levy the rate he claimed. It was a voluntary payment, and it was calculated on a scale that gave him a very inadequate return for his outlay. The onus is on him to prove that the sewers were made "for his own profit." It is a question of motive at the time the sewers were made. We submit that the real intention was to improve and benefit his own property, and

(1) 28 Ch. D. 283. (2) 18 Q. B. D. 577; 20 Q. B. D. 63.
(3) [1893] 2 Q. B. 135.

that the case falls within the principle of *Ferrand* v. *Hallas Land and Building Company* (1).

Sir *E. Clarke*, Q.C., *Neville*, Q.C., and *Ingle Joyce*, for the Defendant, were not called upon.

ROMER, J.:—

The question in this action is whether the sewers at *Minehead*, which were made by the Defendant, were made by him for his own profit within the meaning of sect. 13, sub-sect. 1, of the *Public Health Act*, 1875. It seems to me to be good sense, and it certainly is clear law, that if a landowner, merely for the benefit of his estate, or for the benefit of his tenants, puts in a system of drainage, he cannot, on those facts alone, say that he made his drainage system or his sewers for his own profit, because the profit that is referred to by the Act of Parliament is not that interest, advantage, or gain which may come to a landowner who improves his property by draining by reason of his houses which are drained improving in value or receiving thereby a higher letting value. That is what, in effect, has been decided by the cases to which my attention has been called on behalf of the Plaintiffs. For example, *Acton Local Board* v. *Batten* (2) was a case clearly where the person who had made the sewers had not made them in any way for his own profit within the meaning of the section of the Act, and indeed the owner so stated on oath in the box. The case of *Bonella* v. *Twickenham Local Board of Health* (3) was a case again where certain owners of land laid it out for buildings, made a street, and, as part of their building operations, made a sewer to drain the houses. It was held that that was not a case where the owner could be said to have put in those sewers for the purpose of profit within the meaning of the section. So, again, the case of *Ferrand* v. *Hallas Land and Building Company* was a case where a landowner put in sewers for the sole purpose of draining houses erected by him on his own land. None of those cases at all touch, as it appears to me, the case now before me. This is not a case where a land-

(1) [1893] 2 Q. B. 135. (2) 28 Ch. D. 283.
(3) 18 Q. B. D. 577; 20 Q. B. D. 63.

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owner has put in sewers merely for the purpose of draining his own houses, looking to be compensated for his expenditure in the advantages that may accrue to his houses by having a proper system of drainage. This is a case where the Defendant has laid out money for the purpose of making sewers, intending to be compensated and paid directly for his expenditure on the sewers by receiving payments from all persons, whether they are his tenants or not, who avail themselves of the benefit of his sewers, and where he intended to receive, and did receive, payment direct to him from the persons using his sewers for the benefit of his sewers, and where he has, by reason of his expenditure, received direct remuneration for the expenditure in the way I have indicated. The Defendant constructed these sewers under these circumstances. In 1878 *Minehead* was not well drained. The Defendant was the owner of a great part of *Minehead*; but he was not the owner of the whole of it, or of the whole of the part for which he provided sewers. As to several parts of *Minehead*, he, or his predecessors in title, had granted long leases which were then existing; and, as to other portions of *Minehead*, he, or his predecessors in title, had parted with the fee simple, and his only interest was to receive a rent-charge. In this way, several portions of *Minehead*, which, in a sense, might be said to belong to him, were not certainly belonging to him as owner receiving the rack-rents; and other portions of *Minehead* could in no sense be said to belong to him at all. In this state of things, what the Defendant did was this: he speculated, as it were, in laying down of sewers, not only for those parts of *Minehead* which belonged to him, but for some parts that did not. He speculated in making these sewers with the intention that he should be remunerated, looking on the one hand to the amount to be expended on the sewers, and on the other hand to the interest on the amount of his expenditure he expected to get by a rate to be levied, and he made the sewers for no other consideration. I have no doubt that he bore in mind when he entered into the speculation that he was, as a matter of fact, the owner of a considerable portion of *Minehead* in the way I have stated; but I am certain on the facts that the Defendant expected to be remunerated for his expenditure

in making these sewers by the sewer rate which would be paid to him by all persons who should use his sewers—he knowing that he should have this means of compelling persons to remunerate him, that if they did not pay him the rates he required he could prevent them using his sewers at all. It appears to me that this is undoubtedly a case where the Defendant has constructed sewers for his own profit within the meaning of sect. 13, sub-sect. 1, of the *Public Health Act*, 1875. I cannot help thinking that the Plaintiffs and their predecessors in title, as well as the Defendant, have for a long series of years taken the same view of the matter. Although the sewers were made in 1878, and although the Defendant has ever since then been in receipt of a sewer rate, collected in the way I have indicated from those using his sewers, it is not until 1893 that the Plaintiffs for the first time allege that he had no right to receive the sewer rate during the whole of the intervening period, inasmuch as the Defendant never constructed the sewers for his own benefit, and never held them for his own profit. I am certain that the other view of the facts is the correct one, and that not only did the Defendant construct these sewers for his own profit, but that the Plaintiffs and their predecessors in title so thought until, for some reason which is not obvious, they suddenly turned round and without justification alleged the contrary, and then brought this action. It appears to me for the reasons I have given that this action fails, and must be dismissed with costs.

Solicitor for Plaintiffs: *E. Bogue*, agent for *R. Hole, Minehead.*

Solicitors for Defendant: *Rowcliffes, Rawle & Co.*, agents for *Joyce & Davis, Bardon.*

H. L. F.

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[1865 H. 101.]

Will—Accumulations—Annuities—Gift to Charities—Direction to accumulate Surplus Income—Thellusson Act (39 & 40 *Geo.* 3, *c.* 98).

A testator bequeathed certain annuities, and directed his trustees, in case the annual income should not be sufficient to pay the whole amount of the annuities, to apportion the deficiency rateably, and in case of there being any surplus income, to invest it every year, and after the decease of the last surviving annuitant to convert the trust property and stand possessed of the moneys and the accumulations, in trust to pay and divide the same to the several public charities named (being five in number) according to the amounts set after their names. The amount set after the name of each charity was £100. After providing for the annuities there was a large surplus consisting of pure and impure personalty. The twenty-one years allowed for accumulation by the *Thellusson Act* had expired:—

Held (affirming the decision of *Wickens*, V.C. (1) on this point), that the five charities were entitled to the whole of the residuary pure personalty:

Held, also (affirming the decision of *Stirling*, J.), that the charities were entitled to the accumulations made before the twenty-one years had expired, and were entitled to have the accumulations stopped and to be paid the surplus annual income each year as it accrued.

THIS was an appeal from a decision of Mr. Justice *Stirling*.

J. F. Duncan by his will, dated the 15th of February, 1860, after appointing two executors, directing his debts to be paid, and making a specific bequest to his wife, who predeceased him, gave all the residue of his personal estate to his executors upon trust out of the annual income to pay certain annuities to the persons named; but in case the annual income of the trust moneys should not be sufficient for the payment of the whole amount of the annuities, he directed his trustees to apportion the deficiency between the annuitants according to the amount of their annuities, and so that the same should rateably abate; and upon further trust that the trustees should in every year after his decease invest the surplus income, if any, of the trust moneys, whether such surplus should arise from the determination of any

(1) Law Rep. 12 Eq. 559.

annuity or otherwise in the securities therein mentioned, and from and after the decease of the survivor of the said annuitants should sell and convert into money all such part of such trust moneys, stocks, funds and securities and the accumulations thereof respectively as should not actually consist of cash, and stand possessed of the money to arise from such sale, disposition, and conversion, and also of such part of the said trust moneys, stocks, funds and securities as should consist of actual cash, in trust to pay and divide the same unto the several public charities thereinafter named, according to the amounts set after their respective names (that is to say), to the treasurer for the time being of the *London Orphan Asylum*, £100; to the *Public Dispensary, Carey Street*, £100; to the *Royal Free Hospital, Gray's Inn Road*, £100; to the *King's College Hospital*, in *Carey Street*, £100; and to an institution called the [here there was a blank line] under the patronage of the late Lord Mayor, Alderman *Wire*, for the benefit of persons afflicted with paralysis, the sum of £100.

The testator died on the 1st of January, 1865. A suit was instituted in April, 1865, for the administration of his real and personal estate. The Chief Clerk's certificate shewed that the fifth charity intended to be benefited was the *National Hospital for the Relief and Cure of the Paralysed and Epileptic.*

The pure personalty amounted to the sum of £25,838 2*s.* 3*d.* There was a surplus of income after payment of the annuities, which was invested and accumulated by the trustees.

On the 14th of July, 1871, the suit came on for further consideration before Vice-Chancellor *Wickens*, when his Honour decided that all the testator's residuary estate was given to the five charities referred to in his will equally, which were therefore entitled to the surplus which had been accumulated, amounting at that time to about £8000; but he declined to accede to the application of the charities to stop the accumulation of the surplus, and to pay the future surplus income until the death of the annuitants to the charities (1). He therefore directed the accumulations to go on till further order.

Two of the annuitants were now dead, but others were still

(1) Law Rep. 12 Eq. 559.

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living; and a petition was now presented by the next of kin of the testator asking for the payment to them of so much of the surplus income as had been accumulated since the expiration of the period of twenty-one years from the death of the testator.

The petition came on for hearing before Mr. Justice *Stirling* on the 25th of November, 1893.

Ribton and *Barling*, for the next of kin :—

This case is covered by the decision in *Weatherall* v. *Thornburgh* (1), and the next of kin are entitled, by virtue of the *Thellusson Act*, to the accumulations since the expiration of twenty-one years from the testator's death. The doctrine of *Saunders* v. *Vautier* (2) does not apply to the case of a gift to a charity.

Hadley, for the treasurer of *King's College Hospital* :—

The gift here would, if it were to an individual, carry the fund for all purposes, irrespective of the *Thellusson Act*. *Saunders* v. *Vautier* is quite as applicable to a gift to a charity, particularly an incorporated charity, as to an individual. The effect of the *Thellusson Act* is to alter the will by stopping the accumulations after twenty-one years, but to leave the rest of the will untouched. The Act operates to ensure the enjoyment of the income after twenty-one years. In cases where the class of beneficiaries indicated by the testator cannot be ascertained until after the expiration of the period named by him, there, no doubt, there being no person to whom the accumulations can go, there is an intestacy; but where, as here, there is a gift which clearly carries the accumulations, then that gift will take effect: *Combe* v. *Hughes* (3); *Oddie* v. *Brown* (4); *O'Neill* v. *Lucas* (5); *M'Donald* v. *Bryce* (6); *Eyre* v. *Marsden* (7); *Green* v. *Gascoyne* (8).

The postponement of enjoyment being unlawful, the Act gives everything to the charities: *Bourne* v. *Buckton* (9); *Trickey*

(1) 8 Ch. D. 261.
(2) 4 Beav. 115; Cr. & Ph. 240.
(3) 2 D. J. & S. 657.
(4) 4 De G. & J. 179.
(5) 2 Keen, 313.
(6) Ibid. 276.
(7) Ibid. 564.
(8) 4 D. J. & S. 565.
(9) 2 Sim. (N.S.) 91.

v. *Trickey* (1); *Griffiths* v. *Vere* (2); *Mathews* v. *Keble* (3); *Tench* v. *Cheese* (4). All these cases go to shew that the next of kin only take where there is no person who, within the period, can predicate that he is the person to take. The charities here are in a position to predicate that of themselves.

The Vice-Chancellor did not intend to decide this point against us.

Weatherall v. *Thornburgh* (5) is distinguishable on the ground that there was no residuary legatee under the will. Here the charities are plainly residuary legatees, and under the will the annuitants are not to have recourse to the accumulations.

S. Dickinson, for the treasurer of the *London Orphan Asylum*;

H. Fellows, for the treasurer of the *Royal Free Hospital*; and

Buckley, Q.C., and *T. B. Napier*, for the treasurer of the *National Hospital for the Relief and Cure of the Paralysed and Epileptics*, supported the arguments on behalf of *King's College Hospital*.

Ribton, in reply.

STIRLING, J.:—

This case is not free from difficulty; but, as I have arrived at a clear conclusion in my own mind upon it, I do not think any benefit would be gained by my considering it further.

The question arises upon the will of the testator, *John Francis Duncan*, whose estate is being administered in this action. [His Lordship then referred to the will, and continued:—]

Upon the construction of the gifts to the charities, it has been held and declared by the Vice-Chancellor *Wickens* in this very action that the five charities were entitled to the residue of the testator's personal estate in equal shares. Therefore, this is a gift of the accumulations of the surplus income to the five charities in equal shares, and it is to be observed that the

(1) 3 My. & K. 560.
(2) 9 Ves. 127.
(3) Law Rep 3 Ch. 691.
(4) 6 D. M. & G. 453.
(5) 8 Ch. D. 261.

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annuitants have no interest whatever given to them in those accumulations. The annuitants have no right, as I read the will, to resort to the income of those accumulations in any shape or form to make good any deficiency in their annuities. Therefore, the accumulations are simply directed for the benefit of these five charities, with the direction that they are not to be paid over until the last of the annuitants dies.

Now, if instead of giving the accumulations to charities, the testator had given them to individuals, what would have been the result? It seems to me that *Saunders* v. *Vautier* (1) would have applied, and that in each year in which there was any surplus income the five individuals would have been entitled to come and ask that the surplus income, instead of being accumulated for their benefit until the death of the last annuitant, should be paid over at once, in order that they might enjoy the benefit of it. That is the principle on which the Court acts as regards individuals. It has often been discussed, and in the case of *Gosling* v. *Gosling* (2), before Sir *William Page Wood*, there was a gift of £50,000 to trustees "upon trust to invest in the purchase of lands . . . . upon trust to receive the rents and profits, and out of the same to maintain the premises in repair, and to stand possessed of the surplus upon the trusts for accumulation thereinafter declared." And by a codicil the testator declared as follows: "It is my particular desire that no one shall be put in possession of my estate, or shall enjoy the rent, dividends, and profits of any part thereof, or of any property left by my will or codicil, until he shall attain the age of twenty-five years; and in the meantime the rent, dividends, and profits to accumulate." The Vice-Chancellor held that that was simply null and void, as being an attempt to put a fetter upon an absolute gift. The Vice-Chancellor says (3): "The principle of this Court has always been, to recognise the right of all persons who attain the age of twenty-one to enter upon the absolute use and enjoyment of the property given to them by a will, notwithstanding any directions by the testator to the effect that they are not to enjoy it until a later age:—unless, during the interval,

(1) 4 Beav. 115; Cr. & Ph. 240. (2) Joh. 265.
(3) Joh. 272.

the property is given for the benefit of another. If the property is once theirs, it is useless for the testator to attempt to impose any fetter upon their enjoyment of it in full as soon as they attain twenty-one." At the conclusion of his judgment he says: "It seems to me clear, both upon principle and upon the authorities which were cited, that the clause in the codicil was simply an attempt to put a fetter upon the enjoyment of the property given by the will after the period when the law says the owner of property shall enjoy it." In the case of *Weatherall* v. *Thornburgh* (1), to which I have been referred, Lord Justice *James*, in discussing *Saunders* v. *Vautier* (2), says (3): "There was an absolute gift to begin with, and then a direction to accumulate the income until the legatee attained twenty-five, and the Court acted on the established principle that where there is an absolute gift to an adult male, any direction to restrain his enjoyment of it is absolutely idle, unless there is a defeasance. In such a case a direction to accumulate the income is only a mode of preventing the person entitled from enjoying the property, which can have no effect." Lord Justice *Cotton* says (4): "That case simply decided that if property is given to a person of full age any restriction on his enjoyment of it is inconsistent with his absolute interest."

Now, the gift is not to individuals but to charities: and I have to deal with the fact that this will has been construed, and the question that I have to decide has been considered to a certain extent by Vice-Chancellor *Wickens* in the year 1871. I need not say that any expression of opinion of his, even though it did not amount to a decision, is of the greatest weight. But it is necessary to consider carefully what he did decide and what he did not decide. This suit coming on for further consideration before him, there was an application on behalf of the charities to have, not merely the surplus income paid to them, but to have the *corpus* paid over to them at once. The Vice-Chancellor, after discussing the meaning of residuary gift, says (5): "As regards the pure personalty and the accumulations, I hold that they were well given to the five charities equally. But, having regard to

(1) 8 Ch. D. 261.
(2) 4 Beav. 115; Cr. & Ph. 240.
(3) 8 Ch. D. 269.
(4) Ibid. 270.
(5) Law Rep. 12 Eq. 564.

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the frame of the will, though the annuities are amply secured, I do not think that I can order a division of the fund at present. If the residuary legatees were five individuals, I should probably do so, there being nothing in the *Thellusson Act* to prevent it. But the legatees being charities, am I entitled to stop the accumulations? If a sum of money be given to be accumulated, say for ten years, and then to a charity, is the charity, whether incorporate or unincorporate, entitled to claim the money at once? There may be sound reasons for deferring the enjoyment. A testator may think that the charity has a certain provision during the present generation of subscribers, and that it will not want any additional provision. And it is obvious that though the charity remains the same, yet, if the gift is to take effect ten years hence, a different class of persons will be benefited. It does not appear that all these charities have perpetual existence; but the distinction between an incorporated and unincorporated charity is, I think, too refined to be relied upon. The safe and proper course with respect to all these charities is, I think, to direct that the accumulations should go on until further order. If all the annuitants should die within twenty-one years, there will be no difficulty, but if the accumulations should go on beyond twenty-one years, the Crown may possibly claim them. Whether such a claim, if made, would be valid or not, I give no opinion." Then he goes on: "As regards the pure personalty, I hold that the residue and the accumulations were well given to the five charities in equal shares, but there will be no order directing payment at present to the charities. As regards the impure personalty, as I cannot, for any useful purpose, retain the money in Court, I shall direct it to be paid to the Crown at once."

Now, first of all, how far did the Vice-Chancellor mean by that judgment to go? Did he expressly decide in this case that the doctrine of *Saunders* v. *Vautier* (1) had no application to charities? I do not think that he did so decide. I think that all he meant to do was to reserve the question for decision at a later period, when the persons really interested would be present. He merely took what he considered to be, and said was, the safe and proper course with respect to the charities, and made an order which

(1) 4 Beav. 115; Cr. & Ph. 240.

he thought was the safe and proper one to make in the administration of the funds over which he had control in this very suit. But undoubtedly he did intimate that it was worthy of discussion whether the principle of *Saunders* v. *Vautier* (1) did apply to charities or not. He said: "If a sum of money be given to be accumulated, say for ten years, and then to a charity, is the charity, whether incorporate or unincorporate, entitled to claim the money at once?" That raises the very question, Does the principle of *Saunders* v. *Vautier* apply to charities or not? He then suggests reasons why a different conclusion ought to be arrived at with regard to charities from that which prevails with regard to private individuals. I must consider those reasons. He says: "There may be sound reasons for deferring the enjoyment. A testator may think that the charity has a certain provision during the present generation of subscribers, and that it will not want any additional provision." That is a reason founded on the circumstances of a charity; but a testator may also think that it is desirable to postpone the gift to a private individual for a similar reason. He may think, by postponing the enjoyment of a benefit which he intends for a son till he is of the age of twenty-five or thirty, that he will be better able to dispose of it then than he would be at twenty-one; or there may be provisions made for the son up to the age of twenty-five or thirty which will cease to exist after he reaches that age. Yet the law says that cannot be done. It is a fetter on the enjoyment of the absolute gift in favour of the individual, and the law declines to give effect to the will. I cannot see why the wishes of the testator to postpone the enjoyment by a charity for a generation or more of subscribers should have any greater effect given to them than is given to the wishes of testators respecting the enjoyment by private persons.

Then the second reason he suggests is that, "It is obvious that though the charity remains the same, yet, if the gift is to take effect ten years hence, a different class of persons will be benefited. It does not appear that all these charities have perpetual existence; but the distinction between an incorporated and an unincorporated charity is, I think, too refined to be relied

(1) 4 Beav. 115; Cr. & Ph. 240.

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upon." Even if the payment of the legacy be postponed for a time it does not follow in my opinion that a different class of persons will be benefited; for the charity may have full power —possibly without reference to the Charity Commissioners, or— with the sanction of the Charity Commissioners—to dispose of the future interest and apply the fund, if a proper case is made, for the benefit of other persons than those who would take the benefit if the payment were postponed as directed by the testator. I think that the reasons suggested by the Vice-Chancellor for coming to a different conclusion with respect to the charities from that which prevails with respect to private individuals have not such weight, now that I have heard the question argued by persons who would be entitled to say that the rule in *Saunders* v. *Vautier* (1) should not apply to charities, that I need give effect to them. Being of opinion that the Vice-Chancellor did not intend to decide in a contrary sense, I think it is open to me to hold that the true rule is to apply *Saunders* v. *Vautier* to charities as well as to private individuals. That being so, it seems to me that all the arguments which I have heard on the *Thellusson Act* fall to the ground. The case which was most relied upon was *Weatherall* v. *Thornburgh* (2), and, in that case, it seems to me, the learned Judges who constituted the Court of Appeal were of opinion that if the rule of *Saunders* v. *Vautier* was applicable, there was no question as to the *Thellusson Act.*

I only make one further remark, and point out, that it is the essence of my decision, that in this case the annuitants have no interest whatever in the surplus income, either directly or indirectly. If I had come to the conclusion that the annuitants could benefit by the accumulations, directly or indirectly, then I should have been of opinion that the doctrine of *Saunders* v. *Vautier* would not apply, because the accumulations would not be simply for the benefit of the persons to whom ultimately the fund was given, but would have been for the benefit of other persons, and in that case there would have been great force in the arguments which Mr. *Ribton* based on the *Thellusson Act.*

For the reasons which I have given, I think *Saunders* v. *Vautier* applies, and, consequently, the next of kin are not entitled

(1) 4 Beav. 115; Cr. & Ph. 240. (2) 8 Ch. D. 261.

to these accumulations after the expiration of the twenty-one years from the death of the testator.

G. A. S.

The next of kin appealed from this decision; and they also appealed by special leave from the order made by Vice-Chancellor *Wickens* on the 14th of July, 1871 (1).

The appeals came on to be heard on the 26th of February, 1894.

Crackanthorpe, Q.C., *Hopkinson*, Q.C., *Hastings*, Q.C., *Ribton*, and *Costelloe*, for the Appellants:—

First, we submit that, upon the former hearing of the case (1), Vice-Chancellor *Wickens* took an erroneous view of the construction of the will, and that, according to the true construction, the five charities take nothing more than the specified legacies of £100 each. The testator's meaning is that, in order to pay those legacies, there must be a division of the residue, and that £100 is to be the limit of the legacy each charity is to take.

The counsel for the Respondents were not called upon.

THE COURT (*Lindley*, *Kay*, and *A. L. Smith*, L.JJ.), did not consider that there was any reason for disturbing the order of Vice-Chancellor *Wickens* on this point.

Crackanthorpe, Q.C., *Hopkinson*, Q.C., *Hastings*, Q.C., *Ribton*, and *Costelloe*:—

The second question is, Who is entitled to the income accruing after the expiration of twenty-one years from the death of the testator, when the accumulations were stopped by the *Thellusson Act* (39 & 40 Geo. 4, c. 98)? There is no gift of the income to the charities except in the form of the accumulations, and they are not to be paid till the death of the last surviving annuitant. There is therefore an intestacy as to the void accumulations in the interval, and they go to the next of kin: *Weatherall* v. *Thornburgh* (2); *Ellis* v. *Maxwell* (3); *Green* v. *Gascoyne* (4);

(1) Law Rep. 12 Eq. 559.
(2) 8 Ch. D. 261.
(3) 12 Beav. 104.
(4) 4 D. J. & S. 565.

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Elborne v. *Goode* (1); *Love* v. *L'Estrange* (2); *Talbot* v. *Jevers* (3). It is different from those cases in which the legatee is the absolute master of the fund, and the postponement of its enjoyment is inconsistent with his absolute right, as in *Josselyn* v. *Josselyn* (4), *Rocke* v. *Rocke* (5), *Gosling* v. *Gosling* (6), and *In re Wrey* (7). For here the charities are not absolute masters of the fund; for if the securities out of which the annuities are paid were to fail, the annuitants might claim to have the annuities made good out of the accumulations. *Saunders* v. *Vautier* (8), which is relied on by the Respondents, is not applicable; for the legatees there were individuals. Charities are on a different footing. Their objects fluctuate from time to time, and the persons to be benefited now may be quite different from those who would be benefited after the death of the last surviving annuitant, and who were the objects of the testator's bounty.

Cozens-Hardy, Q.C., and *S. Dickinson*, for the *London Orphan Asylum*:—

We do not claim the capital out of which the annuitants are paid until they are all dead, but only the accumulations which represent the surplus income. Under the express terms of the will the annuitants have no claim on them. Therefore the charities, being the residuary legatees, have an absolute interest in the fund. They might have stopped the accumulations and claimed the surplus income at any time: *Eyre* v. *Marsden* (9); *Oddie* v. *Brown* (10); *Saunders* v. *Vautier*. *Weatherall* v. *Thornburgh* (11) is distinguishable; for in that case there was no residuary gift. The fact that the legatees in the present case are charities makes no difference; there is no reason why the trustees of the charities should not have the immediate enjoyment of the fund of which they are absolute owners.

(1) 14 Sim. 165.
(2) 5 Bro. P. C. 59.
(3) Law Rep. 20 Eq. 255.
(4) 9 Sim. 63.
(5) 9 Beav. 66.
(6) Joh. 265.
(7) 30 Ch. D. 507.
(8) 4 Beav. 115; Cr. & Ph. 240.
(9) 2 Keen, 564.
(10) 4 De G. & J. 179.
(11) 8 Ch. D. 261.

Buckley, Q.C., and *T. B. Napier*, for the *National Hospital for the Relief and Cure of the Paralysed and Epileptics.*

Haldane, Q.C., and *H. Fellows*, for the *Royal Free Hospital*, and

Hadley, for *King's College Hospital*, supported the same view.

Crackanthorpe, in reply, referred to *Re Parry* (1).

1894. Mar. 5. LINDLEY, L.J. (after reading the material clauses of the will, and the order of Mr. Justice *Stirling* appealed from, proceeded as follows):—

The testator died many years ago, and, a suit having been instituted for the administration of his estate, the case came before Vice-Chancellor *Wickens* (2), who decided that the residuary legatees took the residue in equal shares, and we have already stated that upon that point, in our opinion, he was right. The effect of this will is as follows: (1.) The residue is given absolutely to the five charities in equal shares; (2.) The residue is not to be paid to them until all the annuities have come to an end; (3.) the annuities are all charged on the income of the trust estate, and are to be paid annually out of the annual income of that estate; (4.) the surplus, if any, of such income in any year is given to the charities absolutely; (5.) such surplus is to be accumulated until all the annuities have come to an end, and the accumulations are then to be divided between the charities; but the annuitants have no claim to the accumulations, and have no right to have any deficiencies in any year paid out of the accumulations arising from the surpluses of previous years; (6.) The accumulations are directed to be made for a period which might exceed, and which has, in fact, exceeded, twenty-one years from the testator's death.

The question is, Who is entitled to the accumulations which have been made already since the expiration of that period, and which may be made in future until all the annuities cease? The next of kin claim the accumulations under the *Thellusson Act*. The charities claim them on the ground that they, being the

(1) 60 L. T. (N.S.) 489. (2) Law Rep. 12 Eq. 559.

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only persons entitled to the annual surpluses as they arise, were and are entitled to have them paid over to them every year, and that the trust for accumulation is invalid and may be disregarded. Mr. Justice *Stirling* has decided in favour of the charities, and I am of opinion that he is right.

I will first consider the claim of the next of kin. The *Thellusson Act* runs thus—I will read it shortly. It recites that it is expedient that all dispositions of real or personal estate, whereby the profits and produce thereof are directed to be accumulated, and the beneficial enjoyment thereof postponed, shall be made subject to the restrictions hereinafter contained. Then it enacts that no person shall settle or dispose of any real or personal property in such a manner that the rents, issues, profits, or produce thereof shall be wholly or partially accumulated beyond certain periods, one of which is the term of twenty-one years from the death of any such grantor or testator. Then, passing over other portions of the Act which are immaterial, it goes on thus: "And in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits, and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed." The accumulations prohibited are accumulation of income, by which the beneficial enjoyment thereof is postponed, and the funds accumulated contrary to the provisions of the Act are to go to the persons who would have been entitled thereto if the accumulations had not been directed. Who, then, would take the surpluses if the accumulation in this case had not been directed? If the charities, then they are entitled to the accumulations. The *Thellusson Act* itself gives it them. Again, if the trust to accumulate is invalid apart from the Act, and can be properly disregarded, the direction to accumulate the annual surpluses does not postpone the beneficial enjoyment of them, and the Act has no application to the case.

Now, notwithstanding the general principle that a donee or legatee can only take what is given him on the terms on which

it is given, yet by our law there is a remarkable exception to this general principle. Conditions which are repugnant to the estate to which they are annexed are absolutely void, and may consequently be disregarded. This doctrine, I apprehend, underlies the rule laid down in *Saunders* v. *Vautier* (1), and enunciated with great clearness by Vice-Chancellor *Wood* in *Gosling* v. *Gosling* (2). Vice-Chancellor *Wood* says this: "The principle of this Court has always been, to recognise the right of all persons who attain the age of twenty-one to enter upon the absolute use and enjoyment of the property given to them by a will, notwithstanding any directions by the testator to the effect that they are not to enjoy it until a later age:—unless, during the interval, the property is given for the benefit of another. If the property is once theirs, it is useless for the testator to attempt to impose any fetter upon their enjoyment of it in full so soon as they attain twenty-one. And upon that principle, unless there is in the will, or in some codicil to it, a clear indication of an intention on the part of the testator, not only that his devisees are not to have the enjoyment of the property he has devised to them until they attain twenty-five, but that some other person is to have that enjoyment—or unless the property is so clearly taken away from the devisees up to the time of their attaining twenty-five as to induce the Court to hold, that, as to the previous rents and profits there has been an intestacy—the Court does not hesitate to strike out of the will any direction that the devisees shall not enjoy it in full until they attain the age of twenty-five years."

Applying this doctrine to the present case, the charities are not entitled to the capital of the trust estate before the annuities cease, because the annuitants are interested in the income of such capital, and that income is not the sole and exclusive property of the charities. Nor would the charities be entitled to the annual surpluses which there might be before all the annuities ceased, if in any event the annuitants could have recourse to them. But, inasmuch as the terms of the will preclude any such recourse, and the accumulations are directed to be made for the benefit of the charities, and for their benefit

(1) 4 Beav. 115; Cr. & Ph. 240. (2) Joh. 265, 272.

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only, it follows that each yearly surplus, as it arises, is their absolute property, and that the direction to accumulate is invalid, and may be properly disregarded, not only after but during the period of twenty-one years from the death of the testator. This certainly will be so, if the charities can be regarded as ordinary individuals, not under any personal disability. Vice-Chancellor *Wickens* evidently was of this opinion, but he had some doubts about the propriety of so regarding them. As regards one of the charities which is a corporation, there is, in my opinion, no legal ground for this doubt. As regards the other charities, there is more room for hesitation. But here again their trustees are, in my opinion, absolutely entitled to the annual surpluses as against the testator's executors and the trustees of his will, and the annuitants who are his legatees. On this point I agree with Mr. Justice *Stirling*, and I do not regard Vice-Chancellor *Wickens* as dissenting, or doing more than expressing a doubt and leaving the point open for decision. The fact that accumulations have been made since the expiration of twenty-five years from the testator's death will not avail the next of kin. If the surplus income accumulated was the property of the charities, the unnecessary accumulation of that surplus cannot deprive them of their right to it.

The above view of the construction of the testator's will and of the law applicable to it renders it unnecessary to comment on *Weatherall* v. *Thornburgh* (1) and *Talbot* v. *Jevers* (2), except by observing that the directions to accumulate in those cases were only invalidated by the *Thellusson Act* itself, which is not the case here. The appeal must be dismissed with costs.

KAY, L.J.:—

I entirely agree. It seems to me that the case may be shortly stated in this way: The direction to accumulate in this will is altogether futile; the charities have a right to say, "We are entitled to the income; no one else has or can have any interest in it; we do not desire to have it accumulated. We prefer to receive the surplus income as it arises." That right of theirs prevents any accumulation being made, and therefore the

(1) 8 Ch. D. 261. (2) Law Rep. 20 Eq. 255.

Thellusson Act does not apply to the case. It is not within the mischief which the Act is intended to obviate, which was, that an accumulation should not go on for more than the period specified by the Act, so as to take the income away from everybody during the time of that accumulation. Here the right of the charities is to prevent the income being taken away from them at all. They have a right to receive it just as it arises.

I come to that conclusion because, having studied the will very carefully, I think the effect of it is this:—The annuities are to be paid out of the annual income of this residuary fund, and the provision that they are to abate when that annual income is not enough to satisfy them shews that the annuitants have no claim whatever for an arrear of one year upon any income that was received in previous years. Therefore, the surplus income of each year which is directed to be accumulated is a surplus income upon which the annuitants could have no kind of claim. No one else can assert any claim upon it; and, seeing that the fund is given as residue to the charities, including these accumulations, the charities take a present vested interest in that residue; and if no accumulations whatever had been directed, and whether any accumulation is directed or not, all the surplus income of that residue, after satisfying the annuities year by year, belongs as a present vested interest to the charities.

I will try the case again in this way. Suppose there had been no gift to the charities at all except of this surplus income, and that the surplus income had been given to the charities, and then there was a direction to accumulate the surplus income until the death of the last annuitant and then to pay it to the charities, the charities would have the same right that the legatee had in *Saunders* v. *Vautier* (1) to come and say: "We do not desire any accumulation of that to be made; it is given absolutely to us, and therefore we say we would rather take it at once; and the postponement of payment not being for any purpose of the estate, not being for the benefit of the annuitants or any one else at all, we say we would rather not let it accumulate; we will take the income from year to year as it arises."

Now, does it make any difference that, besides the surplus

(1) 4 Beav. 115; Cr. & Ph. 240.

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income, the capital from which that surplus income is to be derived is also given to the charities, and that, as to the capital, they cannot take that until the death of the last annuitant? I do not see why it should. It is quite plain that, as to the capital, they have no right to receive that until the death of the last annuitant. But then there is a reason for that, because the capital was meant to secure all these annuities, and the testator did not choose to give the capital over to the charities until the last of these annuities was satisfied. He has dealt, as I pointed out, otherwise with the surplus income in which the annuitants have no interest whatever. Therefore, for the reasons I have given, because it seems to me that this surplus income was vested in the charities from the death of the testator, and that no one else has the least interest in or claim upon it, the charities have a right to say that the direction for accumulation was altogether a futile thing, that they would rather receive the income at once, and treat the direction for accumulation as a matter which they had a right to disregard. That seems to me to come entirely within the principle of *Saunders* v. *Vautier* (1); and accordingly I think the learned Judge was right, and that this appeal must be dismissed.

A. L. SMITH, L.J.:—

I agree. I have nothing to add.

Solicitors: *Winter & Co.; Hyde, Tandy & Co.; Bower, Cotton, & Bower; Hood Barrs & Co.; Gadsden & Treherne.*

(1) 4 Beav. 115; Cr. & Ph. 240.

M. W.

BENGAL SECRETARIAT LIBRARY

In re SALAMAN.

C. A.
1894
March 14.

Solicitor—Taxation—Separate Retainers.

Where several persons give separate retainers to a solicitor to take proceedings on behalf of all, the strict right of each of them is to have the solicitor's bill taxed without serving any person other than the solicitor; but in order to prevent multiplicity of taxations, the Court will so far as possible direct a single taxation in the presence of all parties interested.

Where thirty-five persons had separately retained a solicitor to take proceedings on their behalf, and fifteen of them applied for taxation of his bill, *Kekewich*, J., ordered taxation, but directed the order not to be drawn up without proof that the others had been communicated with, and either declined to take part in the proceedings or were made respondents. Some of the parties could not be found, and *Kekewich*, J., thereupon dismissed the application:—

Held, on appeal, that *Kekewich*, J., was right in taking steps to have a taxation in the presence of all parties, but was wrong in dismissing the application when it was found impracticable to serve all the parties, and that taxation must be ordered.

IN August, 1889, Mr. *Salaman* was separately retained by thirty-five different persons who had taken shares in the *Passburg Grain Syndicate* to take proceedings on their behalf in the Chancery Division, on the ground that they had been induced to take shares by misrepresentations in the prospectus.

In November, 1889, each of the above parties signed a letter addressed to three of their body, which was as follows:—

"*Re Passburg Grains Syndicate.*

"I hereby appoint you and each of you to act on my behalf in any proceedings against the above company in which I have retained Mr. *Ernest Salaman* as my solicitor, and I hereby authorize you to instruct him on my behalf as you may be advised, and I agree to conform to and be bound by what you may instruct him to do, and this shall be an authority to Mr. *Salaman* to take your instructions on my behalf. I also agree as between myself and the other allottees for whom Mr. *Salaman* is acting, to bear and pay my share of the whole costs and expenses in proportion to the number of shares held by me."

Mr. *Salaman* issued writs on behalf of the various parties, and

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made arrangements that the action of *Stavert* and others against the syndicate should be tried first, and the others stand over till it had been tried. The above committee of three sent out from time to time circular letters to the other allottees informing them of the steps taken in the action, and calling on them for contributions to the expenses in proportion to their shares. Contributions were received to the amount of £2740 0*s.* 5*d.*

In February, 1892, Mr. *Salaman* delivered his bill of costs, amounting to £3043 11*s.* 1*d.*, and made up of a general bill for £2945 10*s.* 11*d.*, and three small bills for which only some of the parties were responsible. Credit was given for £2740 0*s.* 5*d.*, leaving a balance of £303 10*s.* 8*d.*

On the 14th of July, 1892, a summons was taken out in the names of thirty-four of the thirty-five clients (*Stavert* being dead) for taxation of the bill of costs.

It appeared that various of the persons named as Applicants had given no authority to make this application, which was in fact made by the above committee of three on their behalf.

On the 29th of March, 1893, Mr. Justice *Kekewich* pronounced an order, that on the application of the persons therein named (being fifteen of the persons originally named as Applicants) and on the submission of the Applicants to pay what if anything should be due from them respectively, upon the taxation, it should be referred to the Taxing Master to tax the bills, and that the solicitors should give credit for all sums received on account of the Applicants respectively, or for which the Applicants respectively were entitled to credit, and that an inquiry should be ordered what sums had been received by the solicitors for or on account of the Applicants respectively, or for which the Applicants respectively were entitled to receive credit, and that in taxing the bill for £2945 10*s.* 11*d.* the Applicants respectively should bear that proportion of the whole bill which the number of shares held by them respectively bore to 3660 shares. His Lordship directed that the order should not be drawn up until evidence was furnished that the Applicants had communicated with the other parties, and such other parties were either made respondents, or shewn to desire to take no further part in the proceedings.

The Applicants endeavoured to communicate with the other parties; but some of them could not be found, and the condition therefore was not complied with. Mr. Justice *Kekewich* thereupon dismissed the summons. The fifteen Applicants appealed.

Swinfen Eady, Q.C., and *Gatey*, for the appeal:—

The Judge has refused taxation because we have not communicated with all the clients. As we cannot find those with whom we have not communicated, this is a denial of justice. According to the practice, a certificate of which is given in *Re Colquhoun* (1), each client, where the retainers are separate, has a right to have the bill taxed. In *In re Allen* (2) taxation of a bill was ordered in the absence of parties liable to the other shares of it. *Burridge* v. *Bellew* (3) shews that each party is liable only for his own share of the costs, and he must be entitled to have it ascertained for how much he is liable.

George White, for *Salaman*:—

This is an application for taxation under 6 & 7 Vict. c. 73, s. 37, and as it was not made within a month after delivery of the bill the taxation is not of right, but the Court has authority to refer the bill for taxation "with such directions and subject to such conditions as the Court or Judge making such reference shall think proper." Here the Judge has imposed the condition that all parties shall be communicated with. This is a reasonable condition, for if the bill is taxed without notice to them they might apply for taxation. The taxation ought to be once for all, and this can only be the case if all parties are served: *Re Ilderton* (4); *In re Hair* (5).

LINDLEY, L.J.:—

I think that in this case Mr. Justice *Kekewich* has gone too far. Thirty-five gentlemen considered themselves to have causes of action against a company for misrepresentations in the prospectus by which they were induced to take shares. They

(1) 5 D. M. & G. 35.
(2) 11 Ch. D. 244.
(3) 32 L. T. (N.S.) 807.
(4) 33 Beav. 201.
(5) 10 Beav. 187.

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might have brought actions independently; but instead of doing so they combined to take proceedings, and agreed to share the expenses in proportion to the numbers of shares they had respectively taken in the company. They gave Mr. *Salaman* separate retainers, and appointed a committee who were to give instructions to him on their behalf. Calls were made upon the thirty-five which brought in a considerable amount of money to defray the costs of the proceedings. The solicitor having delivered his bill, one of the clients wishes to have it taxed. What is his strict right? To have it taxed without serving any one but the solicitor. But if that were done there might be thirty-five taxations; so what ought the Court to do? The right course would be to have if possible one taxation at which all persons interested would have an opportunity of being present. Mr. Justice *Kekewich* directed that all parties should be communicated with, and that unless they desired to take no part in the proceedings they should be made respondents. So far, I think that he was quite right. But he went on to decide that if the Applicants did not comply with these conditions the summons should be dismissed. The Applicants endeavoured to comply, but were unable to find some of the thirty-five; so the summons was dismissed. That I think was going too far. This is not a case of interfering with the discretion of the Judge; it was a wrong order to dismiss an application on the ground that terms which it was desirable to impose were not complied with, the reason for non-compliance being that it was found practically impossible to comply with them. An order for taxation will be made, and the Taxing Master will be directed to have regard in the taxation to the agreement of November, 1889. The solicitor must pay the costs of the appeal.

KAY, L.J.:—

I agree with Mr. Justice *Kekewich* in most of what he has done. I agree with him that the retainers were separate and not joint. Then, having regard to the agreement as to the apportionment of costs, it is quite right that there should be only one taxation. But in *Re Colquhoun* (1) it is expressly

(1) 5 D. M. & G. 35.

said that each of several persons who have given separate retainers is entitled to taxation. The strict right of each is to have the bill taxed without serving any one but the solicitor. It is, however, convenient and desirable to have only one taxation, and for that purpose to have all parties served; and I think Mr. Justice *Kekewich* was quite right in taking steps to attain that end. Where I differ from him is that I cannot agree with him that if all parties are not served the application must necessarily be dismissed, even where it is found impossible to serve them all. The Applicants had a right to taxation, and if some of the parties interested could not be served it was the duty of the Court to go on without them. To allow a solicitor to escape taxation because the parties who retained him cannot all be served would be a denial of justice.

A. L. SMITH, L.J.:—

I agree.

Solicitors: *Morley, Shirreff & Co.*; *Ernest Salaman, Fort & Co.*

H. C. J.

GREENWOOD *v.* ALGESIRAS (GIBRALTAR) RAILWAY COMPANY.
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March 20.

[1893 G. 972.]
[1894 G. 447.]

Company—Debenture-holders' Action—Receiver—Order for Receiver to borrow Money as a First Charge to preserve the Property—Rules of the Supreme Court, 1883, *Order* XVI., *r.* 9.

In an action by a debenture-holder on behalf of himself and all other debenture-holders, the Court will, in a case of emergency, empower the receiver to borrow money as a first charge on the undertaking, in priority to the debentures, for the preservation of the property.

THE first of the above-mentioned actions was brought by the Plaintiffs on behalf of themselves and all other holders of 6 per cent. debentures and 5 per cent. debenture stock of the

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Algesiras (Gibraltar) Railway Company, and the second action was brought by the same Plaintiffs on behalf of themselves and all other holders of prior lien bonds of the same company, against the company and the trustees of the covering deeds, for the realization of their securities and the appointment of a receiver.

The company, which was limited by shares, had raised in shares, debentures, and debenture stock, and money supplied by the Spanish Government, upwards of £2,000,000; and this had been expended in constructing and maintaining the railway, which was opened in December, 1892. Very serious slips had recently occurred in the line, which was carried through a mountainous country, and it was feared that unless these were made good the traffic would be entirely suspended, and the Spanish Government would declare the railway forfeited for discontinuance of the traffic. The engineers in Spain had employed contractors to repair partially the damage, at an expense of £4500, which they had borrowed on the security of the undertaking, by way of salvage; and it was in evidence that by the law of Spain money borrowed in that way formed a first charge on the undertaking, and might be recovered by the seizure of the railway.

Judgment had been obtained in both actions, and a receiver appointed.

The Defendants took out a summons in both actions before Mr. Justice *Kekewich*, asking that the receiver might be at liberty to raise a sum not exceeding £10,000 to defray the cost of repairing damage caused to the railway by land-slips and other accidents, and to pay expenses necessary to keep the line open for traffic throughout, and to avoid forfeiture to the Spanish Government; and to charge the same with interest not exceeding 7 per cent. upon the net revenues of the company and upon all the company's property, in priority to all other charges.

It was intended, out of the £10,000 to be thus raised, to pay off the £4500 previously borrowed, and to expend the remaining £5500 in the necessary repairs.

Mr. Justice *Kekewich* considered that it was very desirable to make the order, but doubted whether he had jurisdiction to make it, having regard to the fact that the sum thus raised would have

priority over all the existing debentures, the holders of which were not all present, although they were formally represented for the purposes of the actions. He therefore declined to make the order, but suggested that the matter should be taken before the Court of Appeal.

Kirby (*Cozens-Hardy*, Q.C., with him), in support of the application:—

All the debenture-holders would be bound by any order properly made in the actions under Order XVI., r. 9: *Watson* v. *Cave* (1); but the learned Judge doubted whether such an order as that asked for could be made in these actions, unless all parties interested were personally present. There is no reported case of such an order being made; but it has been done in numerous unreported cases, among others in *Inman* v. *Cordova and North-Western Railway Company* (1891 I. 1448), and *Coppinger* v. *Santé Fe and Cordova Railway Construction Company* (1891 C. 3802), and others which are noted in *Palmer's* Company Precedents (2). Receivers are constantly in the habit of obtaining leave to expend small sums in necessary repairs, which are allowed to them in their accounts in priority to all other charges. We ask for this loan on the same principle, namely, that it is to preserve the property for the benefit of all parties.

Abraham, for the Plaintiffs, supported the application.

LINDLEY, L.J.:—

I think the orders which have been previously made justify the Court in granting this application. You may take the order.

A. L. SMITH, L.J., concurred.

Solicitors: *Norton, Rose, Norton & Co.; Bompas, Bischoff, Dodgson & Co.*

(1) 17 Ch. D. 19.

(2) 5th Ed. p. 630.

M. W.

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NORTH, J.
Dec. 15, 16, 19.
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Feb. 27.
C. A.
April 4.

DAVIS *v.* CORPORATION OF LEICESTER.

[1893 D. 2083.]

Vendor and Purchaser—Restrictive Covenant—Building Scheme—Municipal Corporation—Alienation of Corporate Property—Consent of Treasury or Local Government Board—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *ss.* 108, 109, 236—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 72.

In March, 1888, a municipal corporation offered for sale by auction, in lots, some of their corporate land, subject to special conditions restricting the right of each purchaser to build on his lot. At the auction none of the lots were sold. In June, 1888, the Plaintiff entered into a contract to purchase two of the lots, subject to the conditions. The proper steps were taken to obtain the approval of the Treasury, which is required by sects. 108, 109, of the *Municipal Corporations Act*, 1882, to enable a municipal corporation to sell their corporate land; and that approval was given in the ordinary way by two Lords of the Treasury joining in the conveyance to the Plaintiff. The conveyance contained a covenant by the Plaintiff in the terms of the restrictive conditions, but there was no reference to those conditions, or to the previous abortive sale. There was no covenant by the corporation binding them by the conditions as regarded the unsold lots, and the Treasury were not, before they gave their approval, informed that the corporation would be liable to any such restriction. The corporation afterwards contracted with the trustees of a church to sell to them two others of the lots, and authorized them to build on those lots in a manner inconsistent with the conditions:—

Held, by *North*, J., and by the Court of Appeal, that, if the corporation had been ordinary individuals, they would have been bound by the original building scheme, and that they, and the trustees, who had purchased with notice of the scheme, must have been restrained from building or permitting building on the lots purchased by the trustees, in a manner inconsistent with the conditions:

But *held*, that the Treasury had only given their approval to what was to be found in the conveyance, and that they had not sanctioned the disposition by the corporation in favour of the Plaintiff of any right over other land than that which was conveyed to him, and consequently that neither the corporation nor the trustees could be restrained from violating the conditions.

MOTION by the Plaintiff for an injunction to restrain the Corporation of *Leicester* and the other Defendants, who were the trustees of a Presbyterian church, and who had purchased some land from the corporation, from erecting, or permitting

to be erected, on that land any church, chapel, or other building, other than a dwelling-house or houses, and the domestic offices required for the same, contrary to certain conditions of sale, issued by the corporation in March, 1888, subject to which the Plaintiff had purchased some other plots of land from the corporation.

In the month of March, 1888, the corporation offered for sale by public auction large quantities of land in different parts of the borough, under printed particulars and conditions. One of the portions of land so offered, with which alone this action was concerned, was shewn on a separate plan annexed to the conditions as practically one plot of land, being the only land there remaining unbuilt on, the neighbouring land being shewn on the plan as already occupied by residences, which did not in 1888 belong to the corporation, though parts of it had at one time been theirs. This portion of land was divided into fifteen lots, numbered consecutively from 18 to 32 inclusive, with special conditions as to those lots.

It was stated that lot 31 was sold subject to a right of foot and carriage way, as shewn on the plan, for lot 32 and a piece of land belonging to a Mr. *Brierley*.

It was stated that lot 32 was sold with a right of foot and carriage way, as shewn on the plan, over lot 31, and subject to a like right for a piece of land belonging to Mr. *Brierley*.

The general conditions of sale applicable to all the lots provided: (1.) "The lots are offered for sale subject to the approval of the council of the Borough of *Leicester*, and of the Lords of the Treasury." (12) "If the vendors cannot make out a good title to any lot according to these conditions, or if the consent of the council or of the Lords of the Treasury to the sale thereof cannot be obtained, the vendors shall be at liberty to rescind and determine the contract for sale." (34.) "The elevation of all buildings to be erected on the lots shall be subject to the approval of the estate committee of the corporation of *Leicester*." (35.) "The purchaser of each lot shall enter into proper covenants in his conveyance for the observance and performance of such of the above conditions and stipulations as apply to that lot."

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The special conditions applying to lots 18 to 32 inclusive provided: (10.) "The purchaser of each lot will be charged the sum of 2*s.* per square yard of the land purchased, to cover the cost of forming, sewering, paving or macadamizing, channeling, and kerbing half the roads and ways fronting or abutting upon such lot"; (11.) "The front lines or boundaries of the buildings are described on the plans; and no building, wall, or other erection whatever shall be erected on the land which will lie between such building lines and the roads or streets to which the lots adjoin, except as provided for in condition 13, and except bay windows of dimensions to be approved by the estate committee of the corporation." (12.) "The purchaser of each lot shall erect thereon a dwelling-house, or houses, within two years after he enters into possession; and shall not erect any other building thereon than such house or houses, and the domestic offices required for the same, the position and arrangement of any coach-house or stable to be nevertheless subject to the approval of the estate committee." (13.) "The purchaser of each lot shall erect, within one year after entering into possession, and at all times thereafter repair and maintain, a dwarf wall and palisade fence, with pilasters and gates, according to a design to be approved of by the estate committee, along the boundaries of the lot next the roads or streets to which the lot adjoins." (14.) "The purchasers of the several lots shall not at any time exercise or carry on, or permit to be exercised or carried on, any retail trade whatever, or the trade of a butcher, or tallow chandler, or any noisome or offensive trade on the lots, or in any building to be erected theron." (15.) "Every house which shall be erected on any lot, shall be of the annual value of £60 at least . . . . and all houses, fence-walls, and other structures shall be of such form and design externally towards the roads or streets as shall be approved by the estate committee"; (16.) "The exteriors of all the buildings and fence walls which front the roads or streets, and the external parts of the chimneys, shall be faced with pressed bricks or stone, and the woodwork in the said exteriors shall be painted immediately after the execution of the buildings, and at least once in three years for ever afterwards." And, as to lots 21 to 25, and 30

to 32; (18.) "The purchasers of these lots shall, within two years after entering into possession, construct the carriage ways as shewn in the plan over their respective lots, such carriage ways to be of the width of fifteen feet, and to be formed of such materials and in such manner as shall be approved of by the estate committee, and shall at all times thereafter keep such carriage ways in good repair."

The particulars and conditions had been prepared by the town clerk, and submitted by him to the estate improvement sub-committee of the corporation, and had been considered and approved by them; and their report had been approved and adopted by the estate committee and duly recorded. The town clerk, however, deposed that the particulars and conditions were never actually submitted to the council. The auction took place on the 26th of March. None of the lots numbered from 18 to 32 were sold, but some of the other lands offered did find purchasers. On the following day, a report of the estate committee, stating the result of the sale and that the committee were prepared to receive offers for the lots remaining unsold and would report further to the council as occasion might require, was approved and adopted by the council.

Some correspondence ensued between the town clerk and the Plaintiff, and on the 30th of May following, the Plaintiff wrote to the town clerk expressing his willingness to purchase lots 31 and 32 at the prices named by the estate committee, and adding that he would require the contracts to be made out to himself and a Mr. *Witham*. To suit the Plaintiff's convenience, the corporation divided those two lots into three, and on the 26th of June the estate committee reported to the council that they had, subject to the approval of the council and the Treasury, agreed to sell two pieces of land therein described to the Plaintiff, and one to Mr. *Witham*; these pieces of land comprising lots 31 and 32 in the particulars of the auction sale of the 26th of March, and being sold subject to the conditions of sale respecting each lot; and, in accordance with what appeared to have been the usual practice, a copy of the report of the estate committee was sent to each member of the council, and on the same day the report was approved and adopted by the council, and the town clerk

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was directed to prepare the necessary memorial to the Treasury to obtain their sanction. On the 27th of June, formal contracts were signed by the town clerk on behalf of the corporation, and by the Plaintiff and Mr. *Witham* respectively, in the form printed in the fold of the particulars and conditions, which provided in terms that the purchases should be completed according to the foregoing conditions, so far as the same were applicable to each lot, the words "and to a sale by private contract" being added in manuscript.

In 1887 a preliminary scheme for the sale of land of the corporation (including all the lots from 18 to 32, except lot 26), with a plan and valuation by a Mr. *Goodacre*, had been submitted to the Treasury at their request. The lands were described generally as "building land," but no conditions or terms were mentioned or referred to. To that preliminary sale-scheme a general approval was given. The estate committee was then authorized by the council to determine upon the lots, fix the reserve prices, and make all necessary arrangements for offering the same for sale by public auction, and the particulars and conditions were then prepared by the town clerk, and approved as already mentioned. Early in July, 1888, notices were fixed on the door of the town-hall of the intention of the council to apply to the Treasury for their approval of the sale and conveyance to the Plaintiff and Mr. *Witham* of the portions of lots 31 and 32 agreed to be sold to them respectively, and stating that a copy of the proposed memorials would be open for a month for the inspection of any burgesses at the town clerk's office. These notices remained there till the 27th of August, on the 29th of August a memorial was presented to the Treasury, stating that the corporation had agreed to sell those lands to the Plaintiff (describing them particularly and stating the price), that these pieces of land were included in the arrangements for the sale of other properties which had already received the approval of the Treasury, and were comprised in the lots UU and VV on the plan attached to the valuation of Mr. *Goodacre*, and that the prices agreed on were higher than those named in the valuation, and it prayed for the approval of the sale. Nothing was said in the memorial about any building scheme,

nor was there anything to indicate that the purchaser would acquire any rights in relation to any other lands of the corporation. A similar memorial was presented at the same time as to the land purchased by Mr. *Witham*. On the 4th of September, these memorials were answered by a letter conveying the sanction of the board to the proposed sales, but adding that the formal sanction of the Lords of the Treasury would be obtained by two of them being made parties to the deeds, drafts of which must be sent to their solicitors for perusal. This was done, and the conveyances were duly completed accordingly.

The Plaintiff's arrangement with Mr. *Witham* was that the Plaintiff should take the two outer and Mr. *Witham* the central of the three portions into which lots 31 and 32 had been divided; and by deeds, dated the 23rd of November, 1888, the Plaintiff's portions were conveyed to him, the aggregate consideration being £1832 3*s*. 6*d*. The conveyances were made between the corporation of the first part, two of the Lords of the Treasury of the second part, and the Plaintiff of the third part. Each deed recited that the corporation had some time since contracted with the Plaintiff for the absolute sale to him of the piece of land thereinafter described, referring to the contracts before mentioned. The corporation conveyed the land to the Plaintiff "as beneficial owners." Each deed contained covenants by the Plaintiff to the effect of and in substance in the words of conditions 11–18, but the conditions were not referred to. There was no covenant by the corporation binding them by the conditions as regarded the unsold lots, nor in fact any covenants by them, except such as were implied by the use of the words "as beneficial owners." There was no reference in either of the deeds to any building scheme, and nothing to indicate that the purchaser would have the benefit of any restrictive conditions affecting other land of the corporation. Nor did the deeds contain in terms any reference to the right of way across the lands sold to Mr. *Brierley's* land as mentioned in the particulars with respect to lots 31 and 32, nor any reference to the right of the Plaintiff or of Mr. *Witham* to use across the land of the other the intended carriage-way shewn in the plan.

In the year 1890 the Plaintiff contracted to purchase lot 30

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from the corporation, and the conveyance was completed in May, 1891. This transaction was carried through by printed contract, resolutions, and conveyance, in exactly the same way as the other, and the sanction of the Local Government Board, which, by sect. 72 of the *Local Government Act*, 1888, had been substituted for the Treasury, was obtained in the same way.

In March, 1893, the Defendant trustees entered into negotiations with the corporation for the purchase of lots 18 and 19, with a view to the erection of a church and schools thereon. On the 25th of April the corporation approved and adopted a report of the estate committee, and directed that a memorial to the Local Government Board for their sanction to the proposed sale, on the conditions stated in that report, should be sealed with their common seal. That report stated that, subject to the confirmation of the council, the committee had agreed to sell the land in question to the church trustees, subject to the building line being set back from the new street to a uniform depth of twenty-five feet, and also stated that it had been arranged that, "in addition to a dwelling-house or dwelling-houses, as required by the special conditions of sale, a church or chapel, with a hall thereto, might be erected on the land," but that no day or Sunday schools were to be erected or to be held in any of the buildings. On the 13th of May formal contracts were signed by the town clerk and the church trustees respectively in the usual printed form annexed to the particulars and conditions put forward in and used ever since 1888, with the addition thereto of words embodying the arrangement or variation as to the erection of a church referred to in the report of the estate committee.

The building line authorized by this contract with the trustees approached much nearer (in one part as much as fifteen feet) than was permitted by the original plan and conditions. The trustees were let into possession, and they proceeded with the erection of the church, and in so doing they approached nearer to the road than even the new building line permitted.

The Plaintiff, on the 16th of November, 1893, issued the writ in this action, claiming an injunction as above mentioned, and

on the next day he gave notice of motion for an interlocutory injunction. The motion came on for hearing before Mr. Justice *North* on the 15th of December, 1893.

S. Hall, Q.C., and *Dunham*, for the Plaintiff:—

A building scheme such as this is binding upon the corporation, and on all purchasers from them who bought with notice of the scheme, as the Defendant trustees clearly did. This would certainly be so in the case of an ordinary individual vendor. It is true that under sect. 108 of the *Municipal Corporations Act*, 1882, the corporation could not sell their corporate land without the approval of the Treasury, but by sect. 109 they could do so with that approval. All the proper steps were taken, in conformity with sect. 236 (1), to obtain that approval, and the approval of the Treasury in 1888, and of the Local Government Board in 1890, of the respective conveyances to the Plaintiff was duly given. In sanctioning the conveyances, the prior contracts with the Plaintiff, on which the conveyances were founded, were sanctioned, and in that way the conditions upon which the contracts were based were also sanctioned. Therefore, the

(1) By the *Municipal Corporations Act*, 1882, s. 108: "(1.) The council shall not, unless authorized by Act of Parliament, sell, mortgage, or alienate any corporate land without the approval of the Treasury."

Sect. 109: "The council may, with the approval of the Treasury, dispose of any corporate land either by way of absolute sale, or by way of exchange, mortgage, charge, demise, lease, or otherwise, in such manner and on such terms and conditions as the Treasury approve." [These sections are in Part V. of the Act.]

Sect. 236: "(1.) Where the council intend to apply to the Treasury for their approval of any sale, loan, or other financial arrangement under this Act notice of the intention to make the application shall be fixed on the town-hall one month at least before the application, and a copy of the intended application shall during that month be kept in the town clerk's office, and be open to public inspection."

By the *Local Government Act*, 1888, s. 72: "After the appointed day the Local Government Board shall exercise, as regards any county borough, or other borough, the powers conferred by Part V. of the *Municipal Corporations Act*, 1882, relating to corporate property and liabilities, as respects the approval of loans and of the alienation of property, and other matters therein mentioned, and that Part shall, as respects any transactions commenced after the appointed day, be construed as if 'Local Government Board' were throughout that Part substituted for 'Treasury.'"

The "appointed day" is fixed by sect. 109.

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corporation are bound by the building scheme just as an ordinary vendor would be bound.

It is suggested that the Plaintiff has himself infringed the building line. If he has done so, it is a very trifling infringement, and the corporation consented to it. But there has been no general departure from the scheme, or abandonment of it. This action is in substance an action for the specific performance of the conditions, and a trifling breach of the covenant is not a bar to specific performance: *Fry* on Specific Performance (1); *Besant* v. *Wood* (2).

Swinfen Eady, Q.C., and *F. Thompson*, for the corporation:—

The original building scheme was never carried out; no sale took place under it. When the Plaintiff purchased, the matter was *res integra*. By the conditions, the approval of the council of the borough and of the Treasury was expressly made a condition precedent to the contract. The *onus* is on the Plaintiff to shew that these approvals were given, and he has not discharged it. The corporation could not alienate their corporate land without the approval of the Treasury, and the imposition of a restrictive covenant is *pro tanto* an alienation of the land which is subject to the restriction. The Treasury were never informed of the restrictions, and have never approved of them. The effect of these is to diminish the value of the other land. The consent given by the Treasury is of no value, because they did not know of the restrictive conditions: *Pallister* v. *Corporation of Gravesend* (3). The approval of the Treasury was given only by means of the conveyances, and those deeds contain nothing to shew that the unsold land of the corporation was to be subject to any restriction. Nor was the building line ever made known to the Treasury. Indeed, there is no contract by implication binding the corporation with respect to the unsold land. If it was intended that they should be bound by the restrictions, they ought to have entered into covenants with the Plaintiff in his conveyances binding themselves as to the unsold land, and the Plaintiff could have required them to do this: *In re Birmingham and District*

(1) 3rd Ed. pp. 444–448. (2) 12 Ch. D. 605.
(3) 25 L. J. (Ch.) 776.

Land Company and Allday (1). There is no contract under seal binding the corporation by the restrictive conditions, and a corporation can be bound only by a contract under their seal: *Young* v. *Mayor and Corporation of Leamington* (2). The doctrine of part performance does not apply to a corporation.

[NORTH, J., referred to *Wilson* v. *West Hartlepool Harbour and Railway Company* (3).]

There is a great distinction between the case of an estate offered at one time for sale by auction, and that of portions of it sold at different times by private contract; it requires much stronger evidence in the latter case than in the former to shew that the vendor intended to bind his unsold land by restrictions: *Tucker* v. *Vowles* (4).

[NORTH, J.:—Here the land was sold to the Plaintiff expressly subject to the conditions.]

But the conveyance to him, which alone was approved by the Treasury, contains no stipulation as to the unsold land, and no reference to any such a stipulation. The object of sects. 108, 109 of the *Municipal Corporations Act*, 1882, was to prevent corporations from dealing improvidently with their land, and only such terms as have been approved by the Treasury can be enforced by a purchaser against a corporation. A corporation can avail themselves of the defence that they have done what is *ultrà vires*.

Everitt, Q.C., and *MacSwinney*, for the trustees of the church:—

The trustees have expended a large sum of money in ignorance of the existence of any right of the Plaintiff. The corporation always considered that they were released from the original building scheme. They might have divided the lots differently, and indeed the portion purchased by the Plaintiff and *Witham* was divided into three lots instead of two. That was a departure from the scheme. The Plaintiff could not have compelled the corporation to enter into restrictive covenants binding the unsold lots.

(1) [1893] 1 Ch. 342.
(2) 8 App. Cas. 517.
(3) 34 Beav. 187.
(4) [1893] 1 Ch. 195.

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The corporation could not bind themselves without the approval of the Treasury being given to the scheme in detail. The conditions of the Act must be strictly complied with: *Pallister* v. *Corporation of Gravesend* (1); *In re Metropolitan District Railway Company and Cosh* (2).

A corporation cannot be bound by a contract which is *ultrà vires*: *Mulliner* v. *Midland Railway Company* (3). It is a question of intention in each case whether restrictive covenants or conditions were to be mutual or only to bind one party: *Gas Light and Coke Company* v. *Towse* (4); *Tucker* v. *Vowles* (5). The Plaintiff has not shewn that either the corporation or the Treasury assented to the conditions.

S. Hall, in reply:—

The corporation are parties to the conveyances to the Plaintiff, and that is sufficient to prove the consent of the council to the contracts with him on which the conveyances are based. The Plaintiff is entitled to rely on the concurrence of the two Lords of the Treasury in his conveyances as shewing that the Treasury had approved of the contracts with him. The argument of the Defendants really comes to this, that the Plaintiff has no contract at all. The restrictive conditions are not a "sale" of land within the meaning of sect. 109 of the *Municipal Corporations Act*, 1882; the conditions only bind the corporation not to sell the other unsold lots to any purchasers but such as are bound by the conditions. It could not have been intended that the Plaintiff should lay out £900 in building a house on his land, and that after he had done so a public-house should be built next door to him. From the nature of the case there must have been a building scheme, and the Plaintiff's contracts were based on the existence of such a scheme. It is for the benefit of the corporation that the scheme should be carried out.

1894. Feb. 27. NORTH, J.:—

The Plaintiff, who has purchased land from the corporation of *Leicester*, seeks to restrain the corporation, and subsequent

(1) 25 L. J. (Ch.) 776.
(2) 13 Ch. D. 607.
(3) 11 Ch. D. 611.
(4) 35 Ch. D. 519.
(5) [1893] 1 Ch. 195.

purchasers from them, from erecting a church upon land sold to the latter. I shall, in the first place, treat the corporation as having all the powers of an individual owner, reserving for subsequent consideration the question what is the result of their being a municipal corporation. [His Lordship referred to the particulars and conditions of sale above stated, and continued:—]

There is no doubt that the publication of these particulars and conditions was, to use Lord *Macnaghten's* language in *Spicer* v. *Martin* (1), an invitation to the public to come in and buy portions of this estate upon the footing of the general building scheme put forward therein, intended to bind all the purchasers as likely to be for the benefit of all, and to enhance the values of their respective properties, and, consequently, to increase the price they would be willing to pay for their respective lots. The rights of the purchasers *inter se*, when such a scheme exists, to enforce the provisions thereof against one another, and the obligation attaching to the vendors to observe and perform the same, are now thoroughly settled and recognised: See *Renals* v. *Cowlishaw* (2), *Nottingham Patent Brick and Tile Company* v. *Butler* (3), *Mackenzie* v. *Childers* (4), and *Spicer* v. *Martin*. [His Lordship then referred to the negotiations between the corporation and the Plaintiff, the contracts entered into by him and *Witham* for the purchase of lots 31 and 32, and the provisions of the conveyances to the Plaintiff, and, after observing that under sect. 22, sub-sect. 6, of the *Municipal Corporations Act*, 1882, the committees of the corporation, which approved the particulars and conditions of sale, must be deemed to have been duly constituted, and to have had power to deal with the matters in question, and that, under the circumstances, he thought it immaterial that the particulars and conditions were never actually submitted to the council of the borough, he continued:—]

After the execution of these deeds it seems to me impossible to say, as the Defendants argued, that the contracts entered into by the town clerk on behalf of the corporation were not approved of by the council of the borough. The Plaintiff swears that he

(1) 14 App. Cas. 12.
(2) 9 Ch. D. 125; 11 Ch. D. 866.
(3) 15 Q. B. D. 261; 16 Q. B. D. 778.
(4) 43 Ch. D. 265.

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made his purchase in the faith that the conditions as to the building lines and otherwise would be observed on all the other lots, and I see no reason to doubt the truth of this statement. It was contended by the Defendants that the forms of the conveyances shewed that it was not the intention that the corporation and the purchasers of the remaining land from them should be fettered by any building scheme, as, if this had been the intention, the corporation would have been required to enter into corresponding covenants, and could, according to the recent decision in *In re Birmingham and District Land Company and Allday* (1), have been compelled to do so. This argument is not well founded. So far as my experience goes, it was not before that decision the usual practice to make vendors under a building scheme enter into covenants with purchasers as to the user of unsold lots, though it probably will be more common in future. Sometimes vendors have inserted a condition that they will, until sale, hold unsold land subject to the conditions of the scheme, but very often even that is omitted. And the cases make it clear that the absence of such covenants is not fatal. As Vice-Chancellor *Hall* said in *Renals* v. *Cowlishaw* (2), "This right exists not only where the several parties execute a mutual deed of covenant, but wherever a mutual contract can be sufficiently established." See also *Spicer* v. *Martin* (3), and the other cases to which I have already referred. The Defendants also contended that the division of lots 31 and 32 into three portions, instead of two, was in itself a departure which had the effect of making the alleged scheme not binding; but to this again I do not assent. The effect of this might have been different if it had been to authorize something forbidden by the scheme; but this was not the case. The Plaintiff was not restricted from dividing his lots, or as to the number of houses he might erect on each. If he had taken one conveyance to himself of the whole of lots 31 and 32, the corporation could not have complained if he had built three houses on them, and then sold the central house, as this would not have been at variance with any condition or covenant. I can see no departure, or evidence of departure, from the scheme in what was done.

(1) [1893] 1 Ch. 342. (2) 9 Ch. D. 129. (3) 14 App. Cas. 12.

[His Lordship then referred to the Plaintiff's contract in 1890 to purchase lot 30, and the conveyance to him, and continued:—]

I am satisfied that the corporation were still carrying on the same building scheme first put forward in 1888, and it is not suggested by the town clerk that there had been any change of scheme or purpose. The Defendants also contend that the Plaintiff has lost any rights he might otherwise have had by having himself violated the alleged building scheme, by erecting houses which project beyond the fixed building line. Even if such a transgression were proved as alleged, the encroachment would have been trivial. The corporation never made any complaint of it. What was done was done by arrangement with their own officers and according to plans passed by the corporation, and they cannot be heard to complain of it now. But I am not satisfied upon the evidence that the building line was violated by the Plaintiff, or the substance of the scheme departed from to any extent. [His Lordship then stated the negotiations between the corporation and the Defendant trustees, and the provisions of the contract of the 13th of May, 1893, and continued:—]

This variation was obviously a departure from the building scheme, under which no buildings but dwelling-houses, with domestic offices, could be erected on lots 18 and 19. The alteration in the building line was also a departure from the scheme, inasmuch as building was by the new contract authorized much nearer (in one part as much as 15 ft. nearer) to the road than was permitted by the original plan and conditions. The Defendant trustees have been let into possession, and have proceeded with the erection of their church, and in so doing they have approached nearer the road than even the new building line permitted; and the Plaintiff has commenced this action to restrain the Defendants from building or permitting to remain upon the land the church now being erected thereon. The Plaintiff's case rests to some extent upon the allegation that the church will be an eyesore or disfigurement, and an annoyance to the Plaintiff; but I think, considering the distance between the Plaintiff's land and the church, and the nature of the

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intervening land, that this complaint is an idle one. His counsel abandoned it, and relied upon the charge that the erection is a violation of the building scheme—and so I think it clearly is. It was contended that the Plaintiff had known so long of the intention to erect a church on this site that he could not be entitled at any rate to an interlocutory injunction. But, be this as it may, he swears that he did not know until the 13th of November that the church was to encroach on the old building line, and his notice of motion was given on the 17th of November. The church trustees alleged that they never knew till after their purchase that the Plaintiff had purchased any part of this estate or claimed any right to enforce the restrictive conditions. This may be quite true. But, though they might know nothing of the Plaintiff individually, they do not, and obviously could not, deny that they were aware of the existence of the building scheme, and they must have known that some persons had purchased parts of the estate comprised in it, and, whether they knew it or not, they had not taken up their conveyance when this action was commenced against them. Under these circumstances, I am of opinion that, if the vendors had been private individuals, and not a municipal corporation, the Plaintiff would have been entitled to an injunction against the Defendants.

Does, then, the fact that the vendors are a municipal corporation alter the case? The contracts by the Plaintiff, which were signed by the town clerk, were expressly made subject to the consent of the council and of the Lords of the Treasury. I have already expressed my opinion that the corporation by their acts, and especially by the conveyances, confirmed what was done on their behalf; and, having regard to the fact that the contract has been completely performed by the Plaintiff, and to the doctrines as to the effect of performance upon a contract not wholly in writing, expressed in the judgment in *Maddison* v. *Alderson* (1), I see no difficulty in arriving at the conclusion that the corporation are bound, subject to the question as to their power to bind themselves, now to be considered.

By sects. 108, 109, of the *Municipal Corporations Act*, 1882, a municipal corporation cannot, unless authorized by Act of

(1) 8 App. Cas. 467.

Parliament, sell, mortgage, or alienate any corporate land without the approval of the Treasury, but may, with such approval, dispose of any corporate land by way of absolute sale, or by way of mortgage, charge, demise, lease, or otherwise, in such manner and on such terms and conditions as the Treasury approve. The words "or otherwise" seem to me very important, and I understand the effect of these sections to be, that a corporation cannot dispose of their land, or of any right or interest therein, at all, without the sanction of the Treasury, unless by the authority of some Act of Parliament. A voluntary conveyance of land, for instance, would be forbidden by the Act. The mode of application for this approval is by memorial to the Lords of the Treasury; and sect. 236 of the same Act provides that, when the council intend to apply to the Treasury for their approval of any sale, notice of the intention to make the application is to be fixed on the town-hall, one month at the least before the application, and a copy of the intended application is, during the month, to be kept in the town clerk's office and to be open to public inspection.

Lord *Hatherley*, in *Pallister* v. *Corporation of Gravesend* (1), referring to provisions in the *Municipal Corporations Act*, 1835, practically identical with the provisions of the 1882 Act now under consideration, said: "The very requisition of the statute, as to the publication of the contents of the memorial, and the application to the Treasury, show that the burgesses were to have the means of satisfying themselves as to the conduct of the council, and, if they thought proper, of contesting the intended raising of the money. All which things show that the Commissioners would not be supposed to go beyond the memorial submitted to them. Then, the council, having acted upon this approval or a memorial previously submitted by them to the Treasury, cannot, afterwards, give to the mortgagee a further charge on all their property." Previously to the passing of the Act of 1835 a corporation could dispose of its land much as it pleased. But their property having, by virtue of that Act, become trust property in their hands, and their powers of dealing with it being thus cut down, the next step is to see what was

(1) 25 L. J. (Ch.) 776, 778.

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done in the present case. [His Lordship then stated the steps taken in the present case for obtaining the sanction of the Treasury to the conveyances to the Plaintiff, as above stated, and continued:—]

The "arrangements for sale," referred to in the memorials to the Treasury, were merely the submitting to the Treasury Mr. *Goodacre's* plan and valuation, of which the Treasury had expressed a general approval. This was all that had been done. The Treasury was never informed that the corporation had embarked upon any such building scheme as was put forward by them in 1888, and the burgesses never had any such notice of, or opportunity of objecting to, such a scheme as the statute requires. The Treasury never sanctioned the disposition by the corporation in favour of the Plaintiff of any other lands than those actually conveyed to him, or of any right or interest in such lands, and I think the defect is one of substance.

The Treasury had, and the Local Government Board now have, the duty of seeing that corporation land is not sold for less than its proper value. What might be adequate value for a building lot, if sold without the benefit of conditions affecting other lands, might be much too small a price, if the sale were accompanied by a collateral contract that the adjoining land (of equal value for building, but otherwise of little value) was to be kept unbuilt upon. The Treasury when asked to sanction a sale of corporation land is not in a position to express approval if it is kept in ignorance of the fact that the conveyance not only disposes of the land sold, but also disposes of and confers rights over other lands of the corporation. The Plaintiff is in this dilemma. The Treasury have given their approval to all that can be found within the four corners of the deeds of conveyance to him, but nothing to be found in those conveyances gives him any right of action against the Defendants. He claims larger rights outside the conveyances, but these rights depend upon a disposition of corporate property which has not been approved by the Treasury, and the absence of that approval is a fatal defect. The Plaintiff's counsel contended that the corporation ought to have obtained the approval of the Treasury to their whole scheme, and ought not to be allowed to set up a defect arising from their own default

and neglect. But I doubt whether this argument is sound: see *Mulliner* v. *Midland Railway Company* (1). Even if it is, it will not avail the Plaintiff, for the objection is equally fatal to his case if set up by the church trustees, who are not in default. Under these circumstances I must dismiss the motion, and, as against the church trustees, with costs. But, as I think that the Plaintiff has great reason to complain of the conduct of the corporation, I dismiss the motion as against them without costs. If all parties consent to this being treated as the trial of the action, I will deal with the other costs of the action in the same way as I have dealt with the costs of the motion.

W. L. C.

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The Plaintiff appealed from this decision. The appeal was heard on the 4th of April, 1894.

S. Hall, Q.C., and *Dunham*, for the appeal:—

The conveyance to us does not contain any restrictive covenant binding the vendors; but in former times it was not usual for the vendors to enter into such covenants. It has, however, been decided in *In re Birmingham and District Land Company and Allday* (2) that the purchaser is entitled to have them inserted, for that where an estate is put up in lots under a building scheme with a stipulation that each purchaser shall enter into restrictive covenants, each purchaser is entitled to the benefit of such covenants, according to *Spicer* v. *Martin* (3). Here, if the vendors had been private individuals, we should have been, on the principle of *Spicer* v. *Martin*, entitled to the relief we seek, and so Mr. Justice *North* thought; but he went on the ground that, unless restrictive covenants affecting other lots for the benefit of a lot sold were approved by the Treasury, the purchaser was not entitled to the benefit of them. But the conveyance to the Plaintiff refers to a contract. There was only one contract with him—a contract of purchase and sale according to the terms of the building scheme. The Treasury had, therefore, notice of that contract, and, having confirmed the conveyance, must be taken to have confirmed the contract on which it was founded. We

(1) 11 Ch. D. 611. (2) [1893] 1 Ch. 342.
(3) 14 App. Cas. 12.

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contend, however, that restrictive covenants do not require the consent of the Treasury. They clearly do not come within sect. 108 of the *Municipal Corporations Act*, 1882, which prohibits sale, mortgage, or alienation of corporate lands without the approval of the Treasury. Sect. 109 does not in terms prohibit anything, but may be held to prohibit by implication the "disposing of" corporate land without the approval of the Treasury. We say that "dispose of" must mean an act by which an estate or interest in land is given: *London and South Western Railway Company* v. *Gomm* (1); *Mackenzie* v. *Childers* (2). This is nothing but a personal covenant.

[KAY, L.J.:—Does it not come within the words "on such terms and conditions" in sect. 109? In making a disposition of lot 30, terms are introduced which affect lot 14. Must not the Treasury approve of those terms?]

Taking sects. 108, 109, and 236 together, the consent of the Treasury to restrictive covenants does not appear to be necessary. It has been urged that there is nothing under seal to bind the corporation to observe these restrictive covenants; but equities arising from conduct are enforced against corporations as much as against private individuals: *Wilson* v. *West Hartlepool Railway Company* (3); *Crook* v. *Corporation of Seaford* (4).

Swinfen Eady, Q.C., and *F. Thompson*, for the corporation, and *Everitt*, Q.C., and *MacSwinney*, for the trustees of the church, were not called upon.

LINDLEY, L.J.:—

The objection which has been taken, and with which Mr. *Hall* and Mr. *Dunham* have endeavoured to grapple, is one which I do not see my way to get over.

The case is a peculiar one. The Corporation of *Leicester* were in the year 1887 desirous of disposing of a portion of their property according to a scheme which has been shortly referred to as a building scheme, and in 1888 some lots were put up for

(1) 20 Ch. D. 562.
(2) 43 Ch D. 265, 279.
(3) 2 D. J. & S. 475.
(4) Law Rep. 6 Ch. 551.

sale by auction in accordance with certain conditions of sale. The Plaintiff did not buy at that auction; but he afterwards entered into a private contract for the purchase of three lots—30, 31, and 32. The contract referred to the conditions of sale, and the conveyances of those lots were afterwards made, and made in a form which was very common—that is to say, the purchaser entered into a covenant that he would abstain from doing certain things on the lots purchased by him; but there was not in the conveyance any similar covenant by the vendors that they would abstain from doing similar things upon other property which they still retained in their possession, nor was there in that conveyance any covenant or stipulation that the corporation should be, as it were, trustees for the benefit of the Plaintiff of any covenants entered into with them by the purchasers of other lots. The conveyance does not contain any covenant by the vendors except the ordinary covenant for title implied by their being expressed to convey as beneficial owners.

Now, it is nevertheless asserted—and I think it is correctly asserted—that (assuming the corporation to stand on the footing of an ordinary vendor) the terms and conditions upon which this property was bought entitle the purchasers to the benefit of those restrictive stipulations which were introduced for the benefit of everybody who was buying according to the terms and conditions which were printed and circulated at the time of the sale by auction, or, in other words, that the purchaser of each lot purchased upon the terms that he should be entitled to the benefit of those restrictive stipulations. I am disposed to follow the judgment of Mr. Justice *North* on that point.

Then comes the difficulty which is peculiar to this case. The vendor here was not an ordinary person *sui juris*: the vendor was a corporation bound in dealing with its property by the provisions contained in the *Municipal Corporations Act of* 1882, which, as we all know, is a consolidation with one or two amendments of the previous *Municipal Corporations Act of* 1835 and the subsequent Acts amending it. In order to understand the restrictions imposed by those Acts upon municipal corporations in dealing with their own property, we must look back and see what great alterations were made in 1835. Prior to 1835, as the case of

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Mayor of Colchester v. *Lowten* (1), shews, a municipal corporation could sell and dispose of its property. The argument by the Attorney-General there was that the corporation property was trust property, and that the corporation were fettered in their disposal of it. Lord *Eldon* decided the contrary. The great change introduced in 1835 was to make the property of municipal corporations trust property, and that was done so far as real estates were concerned by throwing the rents and profits into what is called the "Borough Fund," and the Borough Fund, including the rents and profits of the land of the corporation, could only be dealt with under the Act of 1835, in a certain specified manner set forth in that Act. That altered the whole position of the property of municipal corporations, and the alteration has been continued from 1835 down to the present time; and in the present Act of 1882, sect. 139, we find the old provisions in the Act of 1835 respecting the Borough Fund reproduced. That is the section that prevents municipal corporations from doing what they like with their own property. We have, then, to deal with certain other sections, viz., sects. 108 and 109 of the *Municipal Corporations Act*, 1882. These sections must be construed with reference to the alterations made in 1835, which transformed the property of municipal corporations into trust property. Sect. 108 is a negative one: "(1.) The council shall not, unless authorized by Act of Parliament, sell, mortgage, or alienate any corporate land without the approval of the Treasury." Then: "(2.) The council shall not, unless authorized by Act of Parliament, lease or agree to lease any corporate land without the approval of the Treasury, except as follows:"—then come certain exceptions, with which we need not trouble ourselves. It is plain that the council shall not sell, mortgage, or alienate any land without the approval of the Treasury. Then comes an enabling section, but an enabling section which contains in it a negative stipulation: "The council may, with the approval of the Treasury, dispose of any corporate land either by way of absolute sale, or by way of exchange, mortgage, charge, demise, lease, or otherwise, in such manner and on such terms and conditions as the Treasury

(1) 1 V. & B. 226.

approve." Now, reading that in connection with the clause relating to the Borough Fund, what does it mean? It means this—that although this property of yours is no longer as it was, your own property, so that you could do what you liked with it, although it is converted into trust property, and you are fettered in your disposal of it, you may, with the consent of the Treasury, do certain things. That means, as I understand it, that you cannot do those things without the consent of the Treasury.

Now, what have the corporation done here? They have obtained the consent of the Treasury to the conveyance of the various lots purchased by the Plaintiff in this case. But what they have not done, whether by oversight or otherwise I do not know, is this: they have not obtained the consent of the Treasury to the disposition of any lot upon the terms that the owner of that lot shall have rights negative or affirmative over any other land of the corporation. That raises a very great difficulty, and, to my mind, an insuperable difficulty. We are asked, in the face of that omission, be it intentional or not, to infer some obligation on the part of the corporation to fetter themselves in the disposal of land not sold to the Plaintiff; in other words, we are asked to say that, although the Treasury have never been consulted on the subject, the land sold to the Plaintiff has been disposed of upon such terms and conditions as entitle him to say to the corporation, "You have come under an obligation to me to preserve other property in a particular shape, and not to sell it except subject to certain specified conditions." I think we have no right whatever to infer such an obligation. It is not to be found in the conveyance, as I have already pointed out. There is no covenant to that effect. It is to be found, if it is to be found at all, upon the consideration of the building scheme; but, in the face of this clause to which I have referred, I do not think it would be right or proper judicially to draw in this case the inference we are asked to draw—that is to say, that the Plaintiff has acquired rights upon other property not conveyed to him, the Treasury not having assented to it, and to impose upon the other property those restrictions and fetters which the Plaintiff seeks to put upon it. I think that is a fatal blot in the Plaintiff's case, and that Mr. Justice *North's* view on

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this particular point is as well founded as his view in favour of the Plaintiff on other points.

I am of opinion that this appeal must be dismissed with costs.

LOPES, L.J.:—

I am of the same opinion. The Plaintiff *Davis* contends that he is entitled to the benefit of certain restrictive covenants affecting land other than that which he bought, the restrictive covenants appearing in the conditions of sale under which he purchased. The particular condition—condition 12—relating to the lots which he bought is in these words: "The purchaser of each lot shall erect thereon a dwelling-house or houses within two years after he enters into possession, and shall not erect any other building thereon than such house or houses, and the domestic offices required for the same, the position and arrangement of any coach-house or stable to be nevertheless subject to the approval of the estate committee." Now, what has happened is this. Years after *Davis* bought—I think it was quite within a recent period—certain trustees of a chapel proposed to erect upon a certain lot about 300 yards from the lots which the Plaintiff bought a certain chapel, and, I believe, a school-house, and it is that of which *Davis* complains. He says under the force of these restrictive conditions he is entitled to prevent that chapel and school being built.

Now, I will assume that he is entitled to the injunction he claims, subject to the provisions of the *Municipal Corporations Act*, 1882, and particularly to those two sections which have been referred to by my Brother *Lindley*—I mean sects. 108 and 109. I do not propose to read those sections. But after careful consideration it appears to me that these two sections ought to be read together, and that the true meaning of the two sections read together is this—that the council are not, unless authorized by Act of Parliament, to sell any corporate land without the approval of the Treasury in any circumstances; but with the approval of the Treasury they may dispose of any corporate lands in any manner, on any terms, and on any conditions, provided such terms and conditions are approved of by the Treasury. It appears to me that that is the proper reading of those two

sections; and it must be remembered that the object that the Legislature had in view was to prevent any corrupt or improvident dealing with corporate property.

If that is the true reading of sect. 109, which is the important section in this case, let us see what has happened here. The sale of these lots which the Plaintiff has purchased has, beyond all question, been approved of by the Treasury. The conveyance has been submitted to them, and, in point of fact, they are parties to that conveyance. But in that conveyance no restrictive covenants of any sort or kind affecting these particular lots upon which the chapel is proposed to be erected appear. There is no notice of any restrictive covenants. In point of fact, as far as I understand, the building scheme has never been brought to the notice of the Treasury. There is nothing in the conveyance, nor in anything which came before the Treasury, to give them notice or warning of any of the restrictive covenants which are relied upon by the Plaintiff *Davis* in this case. That being so, the conclusion at which I arrive is this—that it is impossible to say in these circumstances, in the words of sect. 109, that these conditions—because they cannot be called anything but conditions—have been approved of by the Treasury. I think, therefore, that the conclusion at which Mr. Justice *North* arrived was the right one.

KAY, L.J.:—

I only desire to add a few words out of respect to the very ingenious argument which has been addressed to us by Mr. *Hall* and Mr. *Dunham*. It is important to observe that the nature of this action is an action for specific performance of an alleged agreement, which is not expressed but is to be implied. The writ is indorsed for an injunction to restrain the Defendants from departing from the terms of that alleged implied agreement, and, of course, that is only a mode of obtaining specific performance of that agreement in a Court of Equity.

Now, what is the agreement? The Plaintiff is a person who has bought certain lots of land sold by the Corporation of *Leicester* under what he says is a building scheme. The lots were all put up for sale by auction at one time. They were not then disposed

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of; but afterwards he bought certain of those lots—30, 31, and 32—by private contract, but upon the terms stated in the conditions of sale, which include this particular agreement on which he now relies. The agreement was expressed in the conditions of sale as an agreement which was to be entered into by each purchaser as to his particular lot to abide by the scheme of building which was shewn by those conditions and the plan annexed to them, and, speaking generally, the condition was that no houses should be built upon any of the lots except dwelling-houses, and those dwelling-houses were to be built within the building line which was shewn upon the plan.

The Plaintiff alleges that since this purchase some of the Defendants, the co-Defendants being the corporation, have bought from the corporation other lots—18 and 19—upon the terms that they may depart from that building scheme and erect instead of dwelling-houses a chapel and a school, and, moreover, erect them beyond the building line which was shewn on that plan. Now the Plaintiff took some time ago, in November, 1888, a conveyance of part of his purchase, and he bought another lot in December, 1890, and obtained a conveyance of it. In neither conveyance is there any contract whatever by the corporation that the rest of the land shall be dealt with according to the building scheme. He has no contract with the corporation to that effect, except that which may be implied from the conditions contained in the original building scheme, which I have said were conditions that each purchaser should contract with the vendor to observe that building scheme. But I do not doubt for a moment that the learned Judge was quite right in saying that if this had been a transaction between individuals the effect would have been to bring this case within the well-known decisions which are referred to in the House of Lords in *Spicer* v. *Martin* (1), and that there would have been an implied contract, not only between him and the vendor, but between other purchasers from the vendor and him, that the building scheme should be adhered to by the vendor and by such other purchasers; and accordingly this action would have been quite right if the vendors had been in the position of ordinary individuals who

(1) 14 App. Cas. 12.

have power to deal as they please with their own property. But the difficulty in the case arises from the fact that the vendor here was a corporation, and therefore came within and is bound by the provisions of the statute of 1882. The sections which especially apply to this particular case are sects. 108 and 109. Sect. 108 provides that a municipal corporation shall not sell, mortgage, or alienate any corporate land without the approval of the Treasury. That is entirely a negative clause, and takes away from them the power which originally corporations had at common law of dealing with land belonging to them. But then sect. 109 is differently worded, and I agree it is worded in an enabling form. It provides that the council of the corporation "may, with the approval of the Treasury, dispose of any corporate land either by way of absolute sale, or by way of exchange, mortgage, charge, demise, lease, or otherwise, in such manner and on such terms and conditions as the Treasury approve." Now, reading those two sections together, what is the meaning of them? The first takes away all right of disposition from the corporation except with the approval of the Treasury. The second defines what is meant by approval of the Treasury. They are not merely to approve of the corporation selling the lands, but they are to approve of each particular sale when it comes to be made; they are to approve the price; they are to approve, to take the very words of the section "the terms and conditions" on which that sale is made; and I agree that the meaning of the two sections read together must be this: You shall not sell any land whatever, except with the approval of the Treasury, and that approval shall be the approval of the particular sale and of the terms and conditions on which each particular sale is made. So read, the two sections are perfectly reconcilable, and the function of sect. 109 is to define what sort of approval is intended by the simple word "approval" in sect. 108.

In the present case the building scheme has never been in any way before the Treasury. They never knew of it. The conveyance to the Plaintiff does not mention it, nor refer to any conditions and restrictions affecting other lots than those conveyed. They did see the conveyance. It was submitted to and approved of by them, and two Lords of the Treasury were parties to it. Mr. *Hall* urged with very great ingenuity a proposition

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with which I cannot at all agree. He said that the conveyance, although it does not refer to the building scheme, and although it does not contain any contract by the vendors as to their dealings with the other land, still does refer to a contract under which the Plaintiff bought, and that must have given the Treasury notice that there was a preceding contract, and therefore they had constructive notice of the terms of this contract. But I never yet heard that the doctrine of constructive notice had been pushed so far as to say that when a body in the position of the Treasury in this case had such constructive notice, they must be taken to have approved of that of which they had constructive notice. I should have thought that the doctrine which has always been observed in cases of election, waiver, and the like, viz., that in order to fix a person with election or with waiver of a right it must be made out that he had full knowledge of all the facts and of his rights, would apply *à fortiori* to a case of this kind. Before you can possibly fix the Treasury with approval of this building scheme, you must shew that the Treasury had not merely constructive notice of it, but that they had full knowledge of it, and deliberately and intentionally signified their approval of it. Nothing of the kind is shewn in this case. I do not even think they had constructive notice of it, as there is only a reference in the conveyance to the contract, and they are not bound to look any further than the conveyance. The conveyance was only submitted to them to see whether they approved of that particular sale of which the conveyance expressed the terms, and they did approve of that sale, and none of those terms which it is now sought to enforce were contained in that conveyance. Therefore, I think that argument entirely fails.

Then Mr. *Dunham* with very great ingenuity, if I may be allowed to say so, said that there was no disposition of the lands which the Plaintiff did not buy, including the lands which the Defendants, the trustees, have since bought, and that, therefore, sect. 109 does not apply to the case. But I do not read sect. 109 in that way. There was a disposition to the Plaintiff of the land which the Plaintiff bought, and he says that the terms and conditions of that disposition were that the corporation and other purchasers from them should be restricted in their dealings with the rest of the land. His whole case is that these were terms and

conditions attached to the disposition of his land. That seems to me to be the very thing which was intended and meant to be hit by sect. 109. If those terms and conditions are to be made binding on the corporation, they can only be so by being brought clearly to the knowledge of the Treasury and receiving the approval of the Treasury. Therefore the case is reduced to this, that the Plaintiff is now seeking to bind the corporation and the other Defendants who have purchased other lands from the corporation by an implied agreement from the building scheme, which he says was a term and condition of the disposition of the land to him which he bought, which alleged implied agreement and which terms and conditions have never been submitted to the Treasury, and, of course, have not been approved by them. The answer is that such a thing would be *ultrà vires* of the corporation, because, as I read sect. 109, such terms and conditions attached to the sale of the particular lands which the Plaintiff bought could not be made valid and binding upon the corporation without the approval of the Treasury. There was a very easy mode by which the Plaintiff could have provided against this if he had chosen. No doubt it was first of all the duty of the corporation to obtain the approval of the Treasury; but the thing was in his own power too, because, if he had chosen to have had the terms and conditions expressed in his deed, then they would have been brought to the attention of the Treasury, and the difficulty would not have arisen. From the condition in which the case is put it seems to me that this is an attempt to obtain specific performance of an implied agreement, implied from the existence of a building scheme, which implied agreement was one of the terms and conditions upon which the Plaintiff says he bought, and those terms and conditions have not been approved by the Treasury. They were *ultrà vires* of the corporation which he seeks to bind by them, and neither the corporation nor the subsequent purchasers from the corporation can be treated as so bound. I think, therefore, this appeal fails, and the decision of the learned Judge should be affirmed.

Solicitors: *Morse & Simpson; Field, Roscoe & Co.; Surr, Gribble & Co.*

H. C. J.

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In re HEAD.
HEAD *v.* HEAD (No. 2).

[1892 H. 1924.]

Partnership—Bankers—Death of Partner—Novation—Liability of deceased Partner's Estate—Transfer from Current Account to Deposit Account.

A customer of a banking partnership, after the death of one of the partners, removed money from his current account to a deposit account bearing interest at the same bank, and received a deposit note from the surviving partner:—

Held (affirming the decision of *Chitty*, J.), that there was sufficient evidence of novation to discharge the estate of the deceased partner from liability for the amount placed on deposit.

In re Head (1) distinguished.

THIS was an appeal from the decision of Mr. Justice *Chitty*.

George Head, the testator whose estate was being administered in this action, died on the 10th of December, 1890. At the time of his death he was a partner in a bank at *East Grinstead*, the firm then consisting of himself and his son, *George Searle Head*. *George Searle Head* continued to carry on the business after his father's death under the same style.

The claimant, *A. Tester*, was a customer of the bank, and at the time of the death of the testator had a balance to his credit of £501 11*s.* 6*d.* Between that date and the 24th of December, 1890, he drew out £22 8*s.* 0*d.*, and paid in sums of money amounting to £122 10*s.* 0*d.* On the 24th of December, having full knowledge of the testator's death, he went to the bank and told *G. S. Head* that he wished to draw out £500 from his account in order to invest it at interest. *G. S. Head* advised him not to do so, and told him that if he would place it on a deposit account he would pay him interest at 3½ per cent. To this the claimant consented. *G. S. Head* then gave him a deposit receipt for £500 in the following form:—

"*East Grinstead Bank.* Deposit receipt. December 24th, 1890. Received of Mr. *A. Tester* the sum of £500.

"For *G. & G. S. Head*,
"*G. S. Head.*

(1) [1893] 3 Ch. 426.

"This deposit receipt bears interest at 3½ per cent. per annum if left undisturbed for six months. It is repayable only after twenty-one days' notice."

On the same day the sum of £500 was transferred from the claimant's current account to a deposit account.

The bank stopped payment on the 24th of February, 1892, and *G. S. Head* was subsequently adjudicated bankrupt.

Between the date of the testator's death and the stoppage of the bank the claimant drew out of his current account sums amounting to more than £501 11*s.* 6*d.*, and also paid in various sums, having at the date of the stoppage of the bank overdrawn his current account to the extent of £31 0*s.* 10*d.*

The claimant sought to prove against the estate of the testator, as the deceased partner, for £479 3*s.* 6*d.*, being the balance on the current account at the time of the death of the testator, less the sum of £22 8*s.* 0*d.* drawn out between that date and the 24th of December, 1890.

Mr. Justice *Chitty* held that the placing of £500 at the surviving partner's request on deposit at interest constituted a novation, and that the case was distinguishable from the claim of Mr. *Reynolds* in the same action (1).

The claimant appealed.

Swinfen Eady, Q.C., and *Eve*, for the Appellant:—

There is no difference in principle between this case and the former claim in the same action, where a fresh deposit note was given by the surviving partner, and it was held to be no sufficient evidence of a novation. Here there was only a transfer of the debt to another account; the original debt was not paid off: *Harris* v. *Farwell* (2); *Heath* v. *Percival* (3).

[KAY, L.J., referred to *Bilborough* v. *Holmes* (4).]

R. F. Norton, and *Ernest Hatton*, for the personal representative of the testator, were not called on.

(1) *In re Head*, [1893] 3 Ch. 426.
(2) 15 Beav. 31.
(3) 1 P. Wms. 682.
(4) 5 Ch. D. 255.

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LINDLEY, L.J.:—

I do not think there is any doubt in this case. The customer went to the surviving partner in the bank, and said he should draw out the principal part of the balance on his current account. The banker asked him not to do this, but to place it on deposit; and the customer consented. It seems to me that the case is the same as if the customer had drawn a cheque for the amount and put the money in afresh on a deposit account, the money being paid out and re-lent on a totally different contract from that which existed in regard to the current account. It is not like the cases which have been cited. Where the money was placed on deposit the course of dealing with it was changed. I think it would be unfair to charge the estate of the deceased partner. In my opinion, Mr. Justice *Chitty* was right, and the appeal must be dismissed.

LOPES, L.J.:—

It seems to me that this case is the same as if the customer had drawn a cheque for the £500, and received the money across the counter, and then gone to the other side of the bank where the deposit accounts were kept, and opened a deposit account there by depositing the same £500. The treatment of the current account was different altogether from that of the deposit account. While the money was on a current account it was payable on presentation of a cheque, and it carried no interest; when it was placed on deposit it bore interest, and was no longer payable on a cheque, but it was only payable after twenty-one days' notice. There was in effect payment out from the current account when the customer gave notice for the money to be on deposit, and a new contract was then entered into. The appeal, I think, fails.

KAY, L.J.:—

In this case the father and son were partners; the father died, and the son continued the business. The customer told the surviving partner that he wanted to draw out £500, and was persuaded by him not to do so, but to leave it on deposit instead.

A deposit receipt was then given to him. The current account was continued, and the sum of £500 was drawn out of it and placed on deposit. Money was paid in and drawn out of the current account, and the drawings from it have exceeded the amount placed on deposit; so that if that sum had been left in the current account it would long ago have been swallowed up and the debt discharged. Then the surviving partner became bankrupt, and the customer says that the old debt is not discharged, and he claims to charge the estate of the deceased partner. In my opinion, by the customer taking the money out of the current account, and placing it on deposit, the old liability in respect of it was completely discharged. The whole transaction constituted a new contract with the surviving partner, just as if the money had been taken out and lent to him on his promissory note. The appeal must be dismissed.

Solicitors: *Hasties*, agent for *Hasties, Little, & Hughes, East Grinstead; Clarke & Calkin.*

M. W.

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Company—Dividends—Payment of Dividend out of Capital—Lost Capital.

A limited company was formed the objects of which were to invest its capital in stocks, funds, shares, and securities of various descriptions, and the receipts of the company from the income of these investments were made applicable to paying a dividend. The market price of some of the investments of the company fell, and others of them proved worthless, so that the value of the company's assets was materially diminished; but the income received from the investments for the year considerably exceeded the expenses of the year. One of the trustees of the company brought an action on behalf of himself and all the other stockholders in the company, except the Defendants, against the company and the other trustees to restrain the company from declaring a dividend, on the ground that until the loss of capital was made up a payment of dividend would be a payment out of capital:—

Held (by *Stirling*, J., and by the Court of Appeal), that it was within the power of the company to declare a dividend, for that there is no law to prevent a company from sinking its capital in the purchase of a property

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producing income and dividing that income without making provision for keeping up the value of the capital; and that fixed capital may be sunk and lost, and yet the excess of current receipts over current expenses may be applied in payment of a dividend, though where the income of a company arises from the turning over of circulating capital no dividend can be paid unless the circulating capital is kept up to its original value, as otherwise there would be a payment of dividend out of capital.

THE *General and Commercial Investment Trust* was registered as a limited company on the 26th of January, 1888. Its objects, as defined by clause 3 of the memorandum of association, were:—

(*a.*) "To raise money by share capital and invest the amount thereof in or otherwise acquire and hold any of the following investments (that is to say)" [here followed an enumeration of various classes of shares, stocks, and securities]: "but so that no investment imposing unlimited liability shall be made."

(*b.*) "To borrow or raise money by the issue or sale of any bonds, mortgages, debentures, or debenture stock of the company or in any other manner, to receive money on deposit at interest or otherwise, and to invest the money so obtained in any such investments as aforesaid," with a condition imposing a limit on the amount of bonds, mortgages, &c., to be issued.

(*c.*) "To acquire any such investments as aforesaid by original subscription, tender, or otherwise, and whether or not fully paid up, and to make payments thereon as called up or in advance of calls or otherwise; to subscribe for the same either conditionally or otherwise; to vary any such investments; and generally to sell, exchange, or otherwise dispose of, deal with, or turn to account any of the assets of the company."

(*d.*) "To make advances upon any such investments as aforesaid, and upon the security of landed property, buildings, or hereditaments, or any interest therein, and to act as agents or trustees for any of the above or the like purposes."

* * * * *

(*i.*) "To receive the dividends, income, profits, bonuses, and advantages of every description from time to time payable or receivable in respect of the company's investments, and to apply the same respectively according to the provisions of the articles of association in force for the time being."

Clause 5 of the memorandum was: "The capital of the company

is £1,200,000, divided into 120,000 shares of £10 each, to be converted, when and as from time to time fully paid up, into equal moieties of preferred stock and deferred stock. The preferred stock to be entitled to receive a preferential dividend of £5 per cent. per annum, not cumulative, and payable only out of the profits of each year before any dividend for such year is paid on the deferred stock."

The articles of association provided for the appointment of a body of trustees, who occupied the same position as that usually occupied by directors of a limited company. The following articles require notice:

80. "The share and debenture capital moneys of the company, including any moneys received from the payment off of investments or securities, shall, after paying thereout all expenses of a capital nature, be invested in investments and securities of the kinds mentioned in the memorandum of association. Provided that no purchase or acquisition of any particular security or investment shall be made by which, at the current market value at the time of such purchase or acquisition, the holding of the company in such security or investment would exceed in value one-fiftieth of the subscribed share and debenture capital of the company for the time being."

81. "The trustees shall, on making any change of investment or other financial transaction of the company, maintain as nearly as possible the relative rights of and separation between capital moneys and income, and shall deal with the same accordingly, and shall have power to make all apportionments necessary in that behalf."

84. "Subject to the rights of members holding share capital issued upon special conditions, the receipts of the company from the dividends, income, profits, bonuses, and advantages payable or receivable in respect of the company's investments shall be applicable as follows: (1.) To the payment of a dividend for the particular year at the rate of £5 per centum per annum on the preferred stock; (2.) to the payment of such a dividend on the deferred stock as the same shall suffice to pay. And the trustees may, with the sanction of the company in general meeting, declare a dividend to be paid to the members accordingly."

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85. "The trustees may, before recommending any dividend, set aside out of the profits of the company such sum as they think proper as a reserve fund, to meet contingencies or for equalizing dividends, or for any other purposes of the company, and may from time to time apply the whole or any part of such fund for any purposes of the company."

110. "The surplus assets of the company, upon the winding-up thereof, shall be applied, first, in repaying the holders of the preferred stock the amount paid up in respect thereof, then in repaying to the holders of the deferred stock the amount paid up in respect thereof, and the residue (if any) shall be divided among the members in proportion to the nominal amount of the capital held by them respectively."

Sixty thousand shares in the company were taken and fully paid up, and each share was converted, as to one-half into preference stock, and as to the other half into deferred stock.

The company issued £300,000 debenture stock, bearing interest at £4 per cent. per annum; and the £300,000 received for it, as well as the £600,000 paid on the shares, was invested in shares and securities authorized by the memorandum.

On the 28th of February, 1894, on which day the financial year of the company ended, the state of the company's affairs was as follows: The income received during that year from the company's investments, after payment of the interest on the debenture stocks and of all expenses, left a balance of upwards of £23,000. On the other hand, some of the investments had turned out utterly worthless, and the market price of most of the others had declined; so that, upon the whole, the value of the investments had decreased by at least £250,000.

The present action was brought by one of the trustees, on behalf of himself and the stockholders, except the Defendants, against the company and the other trustees, to have it decided whether, under the above circumstances, a dividend could lawfully be declared. The Plaintiff moved for an injunction to restrain the Defendants from declaring and paying any dividend in respect of the year ending the 28th of February, 1894.

The motion came on for hearing before Mr. Justice *Stirling* on the 23rd of February, 1894.

Hastings, Q.C., and *Kirby*, for the Plaintiffs:—

A company has no profit available for dividends unless its balance-sheet shews a profit—that is, after making good any depreciation in capital. For instance, if it earns £50,000, and loses £100,000 of its capital in one year, it cannot be said to have any profit available for dividend: *Lubbock* v. *British Bank of South America* (1). In *Lee* v. *Neuchatel Asphalte Company* (2) the Court was of opinion that the capital of the company was in fact intact. It is not really a decision that dividends can be paid in spite of a depreciation in capital so long as sufficient assets are left to satisfy the claims of the creditors.

The *Companies Act* of 1877 (40 & 41 Vict. c. 26) gave a company power to reduce its capital by cancelling any capital which was lost, or unrepresented by available assets. That, we submit, shews that in the opinion of the Legislature dividends could not be paid where there had been a loss of capital, and it was passed for the purpose of enabling a company which has lost capital to resume payment of dividends: *Palmer's* Company Precedents (3).

[STIRLING, J.:—If a company can pay dividends, in spite of the loss of capital, I cannot understand to what Sir *G. Jessel's* remarks in *In re Ebbw Vale Steel, Iron, and Coal Company* (4), were addressed, or why the Act of 1877 should have been passed.]

To arrive at the profits earned by a company, you must make out a balance-sheet, and only what remains, after making good the capital, can be fairly regarded as profits: *Coltness Iron Company* v. *Black* (5); *Palmer's* Company Precedents (6).

If the company could go on paying dividends like this, they might go on till every shilling of their capital was gone. The rights of the preference shareholders must be considered as well as those of the creditors. In a winding-up the surplus assets are available, in the first instance, for them.

(1) [1892] 2 Ch. 198.
(2) 41 Ch. D. 1.
(3) 5th Ed. p. 354.
(4) 4 Ch. D. 827.
(5) 6 App. Cas. 315, 329.
(6) 5th Ed. p. 349.

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Buckley, Q.C., and *Eve*, for the company:—

This question really turns upon the provisions of the memorandum and articles of association of the company. The objects of the company are to raise money and invest it in a certain way, and to divide the fruits of so doing. It is not their object to traffic in stocks. If a company has power to put its capital into assets which are liable to shrink, its income is the fruit of what it buys, irrespective of what the value of the property bought may be from time to time.

Of course, dividends cannot be paid out of the proceeds of the realization of capital assets; but in the case of a company of that sort it would not be necessary, before determining what dividend was to be paid, to set aside a sum to make good a supposed annual diminution in the value of the property. That appears from the judgments of Lord Justice *Cotton* and Lord Justice *Lindley* in *Lee* v. *Neuchatel Asphalte Company* (1). Lord Justice *Lindley* there seems to have thought that profits earned by a company can be divided amongst the shareholders, although the greater part or the whole of the capital has been lost.

Lubbock v. *British Bank of South America* (2) would be in point if our investments had gone up in value and we wished to divide the increased value, or if we had sold securities at a loss and did not intend to provide for the loss. But we have sustained no loss, and have made a profit and placed the whole profit to the reserve fund; so the question does not arise.

We are within our rights, under the memorandum and articles, in paying dividends notwithstanding the shrinkage in the value of the investments. The question is, whether there has been a loss which has not been taken into account. That is not the case; there has been a profit. If, in the course of varying investments, we had made a loss, perhaps that ought to be taken into account; but that has not happened.

Hastings, in reply, referred to *In re Tambracherry Estates Company* (3).

(1) 41 Ch. D. 1. (2) [1892] 2 Ch. 198.
(3) 29 Ch. D. 683, 689.

1894. March 6. STIRLING, J. (after stating the facts, continued):—

The question is, shortly, there being a loss in respect of capital of not less than £75,000, and a gain in respect of receipts over expenditure of £23,000, can a dividend be declared? The action is a friendly one, brought for the determination of that question. It is one obviously of great importance to the directors, for the consequences of their making a mistake and distributing a sum approximating to £23,000 amongst the shareholders out of capital would be most serious in case the company hereafter were to be wound up. It is also of great importance from a legal point of view; because, so far as I know, the Court is now for the first time asked to say whether a dividend can be paid out of excess of receipts over expenditure when there has been a loss upon capital.

The first inquiry is, What is the law upon the subject? Up to a certain point that is clear. The general propositions I may take from a case of the highest authority, namely, *Trevor* v. *Whitworth*, in the House of Lords, and I will read a portion of the judgment of the present Lord Chancellor, Lord *Herschell* (1). His Lordship says this: "The *Companies Act*, 1862, requires (sect. 8) that in the case of a company where the liability of the shareholders is limited, the memorandum shall contain the amount of the capital with which the company proposes to be registered, divided into shares of a certain fixed amount; and provides (sect. 12) that such a company may increase its capital and divide it into shares of larger amount than the existing shares, or convert its paid-up shares into stock, but that, 'save as aforesaid, no alteration shall be made by any company in the conditions contained in its memorandum of association.' What is the meaning of the distinction thus drawn between a company without limit on the liability of its members and a company where the liability is limited, but, in the latter case, to assure to those dealing with the company that the whole of the subscribed capital, unless diminished by expenditure upon the objects defined by the memorandum, shall remain available for the discharge of its liabilities? The capital may, no doubt, be diminished by expenditure

(1) 12 App. Cas. 409, 415.

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upon and reasonably incidental to all the objects specified. A part of it may be lost in carrying on the business operations authorized. Of this all persons trusting the company are aware, and take the risk. But I think they have a right to rely, and were intended by the Legislature to have a right to rely, on the capital remaining undiminished by any expenditure outside these limits, or by the return of any part of it to the shareholders. Experience appears to have shewn that circumstances might occur in which a reduction of the capital would be expedient. Accordingly, by the Act of 1867 provision was made enabling a company under strictly defined conditions to reduce its capital. Nothing can be stronger than these carefully-worded provisions to shew how inconsistent with the very constitution of a joint stock company, with limited liability, the right to reduce its capital was considered to be." Then he goes on to consider the provisions of that Act. Now, upon that it has been held, and is well-settled law, that where the annual receipts do not exceed the expenditure, or there happen to be from any cause no annual receipts at all, the capital cannot be applied in payment of dividends upon shares. That has been determined in many cases, among others, in *Flitcroft's Case* (1) and *Guinness* v. *Land Corporation of Ireland* (2). In the present case it is not proposed to resort to capital for the payment of dividends. What is in dispute is whether the excess of receipts over expenditure can be applied for the payment of a dividend while there remains a deficit on the capital. A point of a very similar nature came before the late Master of the Rolls in the case of *In re Ebbw Vale Steel, Iron, and Coal Company* (3). [His Lordship then referred to the facts of that case, and continued:—]

At page 831 of the report the Master of the Rolls says this: "I am very sorry that I cannot accede to this application, which is a most reasonable one, and I have no doubt that if the Legislature amends the Act of Parliament some provision will be made for enabling the Court to do that which I think it cannot do at present. When a joint stock company has lost a portion of its capital, nothing can be more beneficial to the company than to

(1) 21 Ch. D. 519. (2) 22 Ch. D. 349.
(3) 4 Ch. D. 827.

admit that loss—to write it off—and, if it chooses to go on trading, to trade with the diminished capital which remains, the dividend being declared on the capital actually remaining. The object of the present application is to authorize this to be done: that is, a portion of the share capital having been lost, it is desired that something should be written off each share so as to make the share of less nominal value, and to enable the company —still going on trading—to pay a dividend on the amount of the capital actually remaining; but, as I understand the *Companies Act*, 1867, such was not the object of the Act."

I need not read the rest of the judgment, which gives the reasons why Sir *George Jessel* held that the Act of 1867 did not apply to such a case; but, that decision having been given in January of the year 1877, in July following the Legislature passed the *Companies Act* of 1877. It recites, "Whereas doubts have been entertained whether the power given by the *Companies Act*, 1867, to a company of reducing its capital extends to paid-up capital, and it is expedient to remove such doubts." Then it is enacted in sect. 3, after providing, in sect. 2, that the Act was to be incorporated and construed as one with the preceding Acts, that "the word 'capital,' as used in the *Companies Act*, 1867, shall include paid-up capital; and the power to reduce capital conferred by that Act shall include a power to cancel any lost capital, or any capital unrepresented by available assets, or to pay off any capital which may be in excess of the wants of the company."

Then there are certain other provisions, which I need not read. I believe that, after the passing of that Act, an order was made by the late Master of the Rolls on a petition presented by the same *Ebbw Vale Company*, authorizing the reduction of the capital in question to be made.

Now, speaking for myself, I have always read the passage which I have just cited from the judgment of Sir *George Jessel*, as indicating his opinion to be, that when a loss of capital had occurred in a company governed by the Act of 1862, dividends could not be paid unless the loss was made good. The view taken by the late Master of the Rolls appeared to be that for the purpose of ascertaining whether a dividend should be paid or

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not, a balance-sheet must be made out, in the same way as the balance-sheet of an ordinary trading partnership; on one side would be set down the assets of the company; on the other side would be set down, first, the liabilities to the outside world, namely the creditors, and secondly, the liabilities of the company to its own shareholders in respect of capital; and if on one side—on the side of the assets—you found an excess over the liabilities of the two classes I have mentioned, then what remained was profit, and a dividend might be declared. The application of that rule in practice, as we all know, is not without difficulty. Questions may arise on the valuation of the assets, on the valuation of the liabilities, and as to the capital of the shareholders; but such appeared to be the view of the Master of the Rolls as indicated in that passage, and, I believe, in other cases which came before him.

It was suggested in argument before me that that was putting too extensive an interpretation upon the language of Sir *George Jessel*, and that the object of the petition was not really to enable dividends to be paid, but to reduce the amount of the shares, so as to increase the apparent amount of dividend. It is said, and I believe truly, that shares would be thus rendered more marketable. For example, shares in a company with a capital of £50,000 paying dividends of 6 per cent., would, it is said, sell at a higher price, than shares in a company with a capital of £100,000 and paying a dividend of 3 per cent. I can only say that if this was all that was intended, I can scarcely suppose that the Legislature would have been so ready to interfere. But, however this may be, in point of fact the *Companies Act* of 1877 does provide a means by which a company which has lost capital, or whose capital is to any extent not represented by available assets, may reduce that capital, and so be enabled properly to pay a dividend on the reduced capital; and we all know that to this process of reduction of capital, for the purpose of enabling dividends to be paid, recourse has been largely had in practice. This, I am bound to say, seems to me to be a consideration to which great weight ought to be given, so much so, that, but that I have the guidance of the judgments of the members of the Court of Appeal in the case of *Lee* v. *Neuchatel Asphalte*

Company (1), I should probably come to the conclusion that the only proper course which could be taken by a company constituted as the present company is, would be to present a petition, and obtain the sanction of the Court to a reduction of capital before a dividend was declared. In my judgment, however, such a view is inconsistent with the principles laid down by the Court of Appeal in *Lee* v. *Neuchatel Asphalte Company*. That case came before me in the first instance, and, so far as the facts go, the decision does not govern the present. It was found by me that the receipts exceeded the expenditure, and that the capital remained intact; and these conclusions of fact were expressly assented to by Lord Justice *Cotton*, and were not dissented from by either of the other members of the Court of Appeal; but I think that, when their judgments are read, I am bound to come to the conclusion that their decision was rested on other grounds than those which appeared to me to justify my decision, which was affirmed. Now, in considering this part of the case, I think it is best to begin with the judgment of Lord Justice *Lindley*, leaving that of Lord Justice *Cotton* to be dealt with at a later period. At the beginning Lord Justice *Lindley* says (2): "The actual point to be decided appears to me to be comparatively easy. The difficulty in the case arises from the invitation made to us by Mr. *Rigby*"—who argued for the appellants—"to lay down certain principles, the adoption of which would, in my judgment, paralyze the trade of the country." Then, after referring shortly to the facts, and to the nature of the company, his Lordship goes through the provisions of the *Companies Act*, including the Act of 1867 and the *Companies Amendment Act* of 1877. He says this (3): "What I have stated is the whole of the enactments relating to capital which are to be found in the *Companies Acts*. If you look further you find next to nothing about profits or dividends. There is nothing at all in the Acts about how dividends are to be paid, nor how profits are to be reckoned; all that is left, and very judiciously and properly left, to the commercial world. It is not a subject for an Act of Parliament to say how accounts are to be kept; what is to be

(1) 41 Ch. D. 1. (2) 41 Ch. D. 19.
(3) 41 Ch. D. 21.

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put into a capital account, what into an income account, is left to men of business." Then he remarks that they were invited by the appellants to say that there was in the articles a provision as to division of profit which was contrary to law. "Now that raises," says his Lordship, "a curious question, because, putting it into plain language, he is asking us, at the instance of the ordinary shareholders, to break faith with the preference shareholders. He invites us to do it because, he says, the bargain into which the two classes of shareholders have entered cannot be upheld in point of law." I pause there to remark that, in this company the shareholders are (as were the shareholders in that case) divided into two classes, preferred and deferred; and the remarks of his Lordship, as to breaking the bargain between them, have a bearing upon the present case. Then, after reading the articles of association in that case, he says (1): "Having stated shortly what are the provisions of the Acts of Parliament relating to this matter, I may safely say that the *Companies Acts* do not require the capital to be made up if lost. They contain no provision of the kind. There is not even any provision that if the capital is lost the company shall be wound up, and I think this omission is quite reasonable. The capital may be lost and yet the company may be a very thriving concern. As I pointed out in the course of the argument, and I repeat now, suppose a company is formed to start a daily newspaper; supposing it sinks £250,000 before the receipts from sales and advertisements equal the current expenses, and supposing it then goes on, is it to be said that the company must come to a stop, or that it cannot divide profits until it has replaced its £250,000, which has been sunken in building up a property which if put up for sale would perhaps not yield £10,000? That is a business matter left to business men." Pausing there for a moment, I may remark that, if I understand the illustration which the Lord Justice uses, it is the case of a company which has invested its property in an unavailable asset, and therefore is plainly a case which was contemplated by the Act of 1877, yet his Lordship says that they may go on and pay dividends, notwithstanding the existence of the provisions of the Act of

(1) 41 Ch. D. 22.

1877, without, as I understand him, applying to the Court for its sanction to a reduction of capital. Then he continues: "If they think their prospects of success are considerable, so long as they pay their creditors, there is no reason why they should not go on and divide profits, so far as I can see, although every shilling of the capital may be lost." That, again, is a case which is contemplated by the Act of 1877, a case where a company has lost capital; and it is said there is no reason, as long as the company pay their creditors, why they should not go on and divide profits. "It may be a perfectly flourishing concern, and the contrary view I think is to be traced to this, that there is a sort of notion that the company is debtor to capital. In an accountant's point of view, it is quite right, in order to see how you stand, to put down company debtor to capital. But the company do not owe the capital. What it means is simply this: that if you want to find out how you stand, whether you have lost your money or not, you must bring your capital into account somehow or other. But supposing at the winding up of the concern the capital is all gone, and the creditors are paid, and there is nothing to divide, who is the debtor? No one is debtor to any one. If there is any surplus to divide, then, and not before, is the company debtor to the shareholders for their aliquot portions of that surplus. But the notion that a company is debtor to capital, although it is a convenient notion, and does not deceive mercantile men, is apt to lead one astray. The company is not debtor to capital; the capital is not a debt of the company." Then he says: "Having shewn from the Acts (negatively, of course, because this is a negative proposition, and can only be proved by looking through the Acts) that the Acts do not require the capital to be made up if lost, I cannot find anything in them which precludes payment of dividends so long as the assets are of less value than the original capital. If they are so, it becomes a question of prudence for mercantile men whether they will wind up or not. I have already pointed out that the Act says nothing to make the loss of the capital a ground for winding up, and I have already pointed out that it says nothing about profits. The Act does not say that dividends are not to be paid out of capital, but there are general principles of law

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according to which the capital of a company can only be applied for the purposes mentioned in the memorandum of association." Then he applies that to the case which he had before him where the company's property was of a wasting nature, and he says (1): "If a company is formed to acquire and work a property of a wasting nature, for example, a mine, a quarry, or a patent, the capital expended in acquiring the property may be regarded as sunk and gone, and if the company retains assets sufficient to pay its debts, it appears to me that there is nothing whatever in the Act to prevent any excess of money obtained by working the property over the cost of working it, from being divided amongst the shareholders, and this in my opinion is true, although some portion of the property itself is sold, and in some sense the capital is thereby diminished." He also adds: "It appears to me that the proposition that it is *ultrà vires* to pay dividend out of capital is very apt to mislead, and must not be understood in such a way as to prohibit honest trading. If you treat it as an abstract proposition that no dividend can be properly paid out of moneys arising from the sale of property bought by capital, you find yourself landed in consequences which the common sense of mankind would shrink from accepting. On the other hand, if the working expenses exceed the current gains, you cannot divide your capital under the head of profits when there are no profits in any sense of the term." Then he refers to certain cases, and says: "If those cases are studied, it would be seen, I think, with sufficient clearness that that is really what is meant. You must not have fictitious accounts. If your earnings are less than your current expenses, you must not cook your accounts so as to make it appear that you are earning a profit, and you must not lay your hands on your capital to pay dividend. But it is, I think, a misapprehension to say that dividing the surplus after payment of expenses of the produce of your wasting property is a return of capital in any such sense, as is forbidden by the Act." Then finally he says: "As regards the mode of keeping accounts, there is no law prescribing how they shall be kept. There is nothing in the Acts to shew what is to go to capital account or what is

(1) 41 Ch. D. 24.

to go to revenue account. We know perfectly well that business men very often differ in opinion about such things. It does not matter to the creditor out of what fund he gets paid, whether he gets paid out of capital or out of profit net or gross. All he cares about is that there is money to pay him with, and it is a mere matter of book-keeping and internal arrangement out of what particular fund he shall be paid. Therefore you cannot say that the question of what ought to go into capital or revenue account is a matter that concerns the creditor. The Act does not say what expenses are to be charged to capital and what to revenue. Such matters are left to the shareholders. They may or may not have a sinking fund or a deterioration fund, and the articles of association may or may not contain regulations on those matters. If they do, the regulations must be observed; if they do not, the shareholders can do as they like, so long as they do not misapply their capital and cheat their creditors. In this case the articles say there need be no such fund, consequently the capital need not be replaced."

Lord Justice *Lopes* takes a very similar view. He says (1): "It is said by the appellant that a company is not at liberty to pay a dividend unless they can shew that their available property at the time of declaring the dividend is equivalent to their nominal or share capital. In my opinion such a contention is untenable. Where nominal or share capital is diminished in value, not by means of any improper dealing with it by the company, but by reason of causes over which the company has no control, or by reason of its inherent nature, that diminution need not, in my opinion, be made good out of revenue. In such a case a dividend may be paid out of current annual profits, out of profits arising from the excess of ordinary receipts over expenses properly chargeable to the revenue account, provided there is nothing in the articles of association prohibiting such an application, and provided it is done honestly. It appears to me that if a contrary view were adopted it might be successfully contended that where, owing to extraneous circumstances, the capital is increased in value, that increase might be dealt with as revenue or profits, and go to increase the dividend. This is contrary to all practice,

(1) 41 Ch. D. 26.

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and I think contrary to principle. The capital and the revenue accounts appear to me to be distinct and separate accounts, and, for the purpose of determining profits, accretions to and diminutions of the capital are to be disregarded." Now, I turn lastly to the judgment of Lord Justice *Cotton*. That is expressed in language more guarded than that of his two learned colleagues, but it is to be observed that the Lord Justice did not express in any way any dissent from anything that fell from those two learned Judges; and there are passages in his judgment which seem to shew, though not so forcibly as those which I have just read, that his opinion was similar. He says this (1): "There is nothing in the Act which says that dividends are only to be paid out of profits. There is a provision to that effect in table A., and that rather favours the view that the matter of how profits are to be divided and dealt with, and out of what fund dividends are to be declared, is a matter of internal regulation. But still there is this firmly fixed, that capital assets of the company are not to be applied for any purpose not within the objects of the company, and paying dividend is not the object of the company, the carrying on the business of the company is its object. If this property was property of another nature, property which would not be reasonably or properly consumed in providing profit, the case would stand in a very different position. If there was a permanent property which would not be reasonably or properly so consumed, but the fruit of which only would be used in providing profit, then if the directors were to sell, or the shareholders were to authorize a sale of that, and then to declare a dividend out of the proceeds, that would clearly come within the case of *Guinness* v. *Land Corporation of Ireland* (2), for it would be applying the capital of the company to a purpose which was not authorized." Then at the end of his judgment, after referring to two cases before the late Master of the Rolls of *Davison* v. *Gillies* (3) and *Dent* v. *London Tramways Company* (4), and commenting upon them, he adds this: "They favour the view which I entertain, that in considering whether this is to be treated as an honest division of profit, or as a division of capital

(1) 41 Ch. D. 17, 19.
(2) 22 Ch. D. 349.
(3) 16 Ch. D. 347, n.
(4) 16 Ch. D. 344.

under the guise of declaring a dividend, the Court will have regard to the directions of the articles, although, of course, if those articles authorize not a mere division of profit but a division of capital (using 'capital' in the proper sense of the word—by which I mean permanent assets, and assets not to be expended in providing for the profit earned by the company), such a provision will be *ultrà vires* and void."

It seems to me, therefore, that I must have regard to the constitution of the company and the articles of association. I must examine them and see what provisions they contain, and observe whether they authorize, not a mere division of profit but a division of capital, meaning, in the language of Lord Justice *Cotton*, "permanent assets, and assets not to be expended in providing for the profit earned by the company."

The objects of the company, as defined by the memorandum of association, are these: "(*a*) To raise money by share capital and invest the amount thereof in, or otherwise acquire and hold, any of the following investments"; and then a list of the investments is given, "(*b*) To borrow or raise money by the issue or sale of any bonds, mortgages, debentures, or debenture stock of the company, or in any other manner, to receive money on deposit at interest or otherwise; and to invest the money so obtained in any such investments as aforesaid;" (*c*) "To acquire any such investments as aforesaid by original subscription, tender, or otherwise, and whether or not fully paid up, and to make payments thereon as called up, or in advance of calls or otherwise; to subscribe for the same either conditionally or otherwise; to vary any such investments, and generally to sell, exchange, or otherwise dispose of, deal with, or turn to account any of the assets of the company." Then there are certain other objects which I need not read, and I pass on to (*i*), "To receive the dividends, income, profits, bonuses, and advantages of every description from time to time payable or receivable in respect of the company's investments, and to apply the same respectively according to the provisions of the articles of association in force for the time being." Then clause 5 divides the capital "into 120,000 shares of £10 each, to be converted when and as from time to time fully paid up into equal moieties of preferred stock

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and deferred stock; the preferred stock to be entitled to receive a preferential dividend of £5 per cent. per annum, not cumulative, and payable only out of the profits of each year, before any dividend for such year is paid on the deferred stock." Now, on that memorandum, speaking broadly, the object of the company is, to raise money and to invest it. There is a power of sale of investments, and it might be contended that that authorized the carrying on of a business in the nature of that of a stock or share broker. I do not think that is the true meaning. I think that what was intended was investment, not stock or share broking; and in point of fact, as I understand, no trafficking with the assets has taken place, although the investments have, in accordance with the power, been from time to time varied. The articles of association which are material are, first, article 80: "The share and debenture capital moneys of the company, including any moneys received from the payment off of investments or securities"—that includes all moneys received from the payment off of investments or securities, and it might be that those moneys would exceed the amounts originally invested —"shall after paying thereout all expenses of a capital nature, be invested in investments and securities of the kinds mentioned in the memorandum of association." Then there is a certain limitation imposed which is for this purpose immaterial. Article 81 provides: "The trustees shall on making any change of investment or other financial transaction of the company, maintain as nearly as possible the relative rights of and separation between capital moneys and income, and shall deal with the same accordingly, and shall have power to make all apportionments necessary in that behalf." That is to say, on making any change of investment, the sums received are to be apportioned so as, as nearly as possible, to maintain the distinction between capital and income. Then article 83 is: "An annual sum equal to 1 per cent., upon the first £250,000 of the share capital and debenture capital of the company for the time being subscribed and paid up, and one-half per cent. upon all such capital in excess thereof, shall be set aside by the trustees out of the revenue of the company for management expenses, and no expenses beyond that sum (other than broker-

ages on the share and debenture capital issued, and on the purchases and sales made by the company and legal expenses) shall be incurred by them without the consent of the company in general meeting." Then, "The said sum to be set aside as aforesaid shall include the remuneration of the trustees who shall be entitled to receive as their remuneration any surplus of the said sum which may remain in any year after payment of all management expenses." Then article 84 is this: "Subject to the rights of members holding share capital issued upon special conditions, the receipts of the company from the dividends, income, profits, bonuses, and advantages payable or receivable in respect of the company's investments" (these are the same words that occur in the memorandum of association) "shall be applicable as follows: (1.) To the payment of a dividend for the particular year at the rate of £5 per cent. per annum on the preferred stock; (2.) To the payment of such a dividend on the deferred stock as the same shall suffice to pay. And the trustees may with the sanction of the company in general meeting declare a dividend to be paid to the members accordingly." Article 85 says: "The trustees may, before recommending any dividend, set aside out of the profits of the company such sum as they think proper as a reserve fund, to meet contingencies or for equalizing dividends, or for any other purposes of the company, and may from time to time apply the whole or any part of such fund for any purposes of the company." That is purely permissive, and not imperative. Then article 86 says: "When in the opinion of the trustees the profits of the company permit, interim dividends not exceeding 5 per cent. per annum may be declared and paid by the board on account of the dividend for the then current year on both preferred and deferred stocks, and if the profits for the whole year shall in such case prove insufficient to pay the full dividend of 5 per cent. for such year on the preferred stock, the holders of such stock shall not be entitled to have the deficiency made up." So that if the preferred shareholders in any year are deprived of the dividend, it is never made up to them afterwards. Then article 110 provides: "The surplus assets of the company upon the winding up thereof shall be applied, first, in repaying the holders of the preferred

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stock the amount paid up in respect thereof, then in repaying to the holders of the deferred stock the amount paid up in respect thereof, and the residue (if any) shall be divided among the members in proportion to the nominal amount of the capital held by them respectively." The result, therefore, of not declaring a dividend, and of putting the excess of receipts over expenditure to the credit of the reserve fund, would be to preserve the capital of the company really for the ultimate benefit of the deferred shareholders—a result similar to that which would have followed if the decision in *Lee* v. *Neuchatel Asphalte Company* (1) had been other than it was; and, therefore, in that respect the present company and the *Neuchatel Company* stand on a similar footing.

Having regard to articles 80 and 81, I read the words "profits, bonuses, and advantages" in sub-clause (*i*) of the 3rd clause of the memorandum of association, and in the 86th article of the articles of association, as meaning profits, bonuses, and advantages in the nature of income, and as not applying to any increment of capital. The scheme of the company appears to me to be to put the shareholders for the time being in the same position as regards dividends as are tenants for life under an ordinary settlement of personal property, while the persons amongst whom the capital would be divided in the event of a winding-up are intended to stand in the position of the remaindermen entitled to the *corpus* of the settled property. Tenants for life under such a settlement would take the whole income of all duly authorized investments, notwithstanding any shrinkage or decrease in their value, and would not be entitled to share in any augmentation in the value of the *corpus*, however great that might be, or however insignificant in comparison might be the increase of the income. The word "profit" in articles 85 and 86 I read as meaning excess of income over expenses of management, and, so reading the word, I think such excess was intended to be applicable for the payment of dividend, notwithstanding shrinkage in the value of investments or loss of capital occasioned thereby. The investments seem to me to constitute permanent assets within the meaning of Lord Justice *Cotton*, in the passage which I have read from his judgment. Those assets remain

(1) 41 Ch. D. 1.

intact, save by causes over which the company has no control. Any diminution in their value has arisen, not from any dealing with them by the company itself, but from their own inherent nature, and it is not sought to expend any portion of them in providing for profit or dividend.

Lastly, it appears to me that the creditors are amply provided for, and that there need be no apprehension of their being cheated, to use the expression of Lord Justice *Lindley*. The interest on the debenture stock which constitutes the main liability of the company is provided for out of the income arising from the investments, and the capital of those investments at the present time appears amply sufficient for payment of the principal.

Under these circumstances, I think it is not made out that the payment of a dividend is beyond the power of the company. Whether it is prudent that a dividend should be paid is not for me to decide, but for the men of business of whom the company is constituted. I base my decision on the peculiar nature of the constitution of this particular company; and it is not to be assumed that I should have arrived at the same conclusion if I had been dealing with an ordinary trading company—if, for example, the object of the company had been to carry on the business of a stockbroker, and the investments had been the ordinary stock-in-trade of that business.

It follows from my view of the nature of the company that the shareholders would not be entitled to divide for the purpose of dividend any increase in the value of the investments, however great. It is urged that, if this be so, my decision conflicts with the decision of Mr. Justice *Chitty* in *Lubbock* v. *British Bank of South America* (1). The answer is—that the nature of the two companies is quite different. The *British Bank of South America* was evidently constituted as an ordinary trading company, and the mode which the learned Judge thinks is the proper one for making out the accounts of that company, as stated at page 202, shews that to have been his meaning; moreover, he expressly distinguishes the case before him from that of *Lee* v. *Neuchatel Asphalte Company* (2). In the present case I do not hold the Defendant company to be an ordinary trading company.

(1) [1892] 2 Ch. 198. (2) 41 Ch. D. 1.

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Lord Justice *Lindley*, in concluding his judgment in *Lee* v. *Neuchatel Asphalte Company*, says this (1): "I hope I am not inadvertently, certainly I am not intentionally, laying down any rule which would lead people to do anything dishonest either to shareholders or creditors." I take leave on my own behalf to express a similar hope, and to add this, that I trust I have not misinterpreted the views of the Court of Appeal in a matter of so much importance, and, further, that if I have, any misconceptions of mine may be speedily removed by the decision of a higher tribunal.

There will be no order on the motion.

G. A. S.

C. A.

The Plaintiff appealed from this decision. The appeal came on for hearing on the 14th of March, 1894.

Hastings, Q.C., and *Kirby*, for the appeal:—

We say that in declaring this dividend the company are in fact paying away capital in defiance of the law laid down in *Trevor* v. *Whitworth* (2). A large loss has arisen on the securities held by the company, the dividend which they are now proposing to pay comes indeed only out of the sums received for income on their securities; but we say that this income ought to go to make up the loss, and that the payment of it in dividends is a payment of dividend out of capital. The company is now in the same position as the *Ebbw Vale Steel, Iron, and Coal Company* (3). If a company which has lost part of its capital can go on trading with the remainder and pay dividends, the objections of Sir *G. Jessel* in that case are unintelligible, and the *Companies Act*, 1877, was unnecessary. The company must replace the lost capital before they can declare a dividend, otherwise they will be in effect paying the dividends out of capital. If they wish to write off the capital which they have lost, they ought to proceed by passing a resolution and presenting a petition under the *Companies Act*, 1877, s. 3, which was passed in consequence of the decision of the late Master of the Rolls in *In re Ebbw Vale Steel, Iron, and Coal Company*. Mr. Justice

(1) 41 Ch. D. 26. (2) 12 App. Cas. 409, 415.
(3) 4 Ch. D. 827.

Stirling said that he might have come to a different conclusion if this had been an ordinary trading company; but there is no difference in principle between this company and an ordinary trading company.

Buckley, Q.C., and *Eve*, for the company:—

Every company, trading or otherwise, must sink its capital, although it is not allowed to return it to the shareholders. The capital account shews what is done with the capital; the income account, on the basis of which the dividend is declared, has nothing to do with the amount of capital, and if that account shews a profit a dividend may be declared out of that profit. In the case of a limited company, the creditors have the disadvantage of the liability of the shareholders being limited; but they have the advantage of the company being tied down not to employ its capital for any but the objects defined in the memorandum. The Act does not directly prohibit payment of dividend out of capital, but such payment is unlawful because it is applying capital in a manner not sanctioned by the memorandum. Now, what is the test of there being profit out of which dividend may be declared? If a transaction in the course of the ordinary business of the company results in a loss, there is a loss which must be debited to income, and the fund for dividend is diminished. But if a leasehold is bought, to be permanently held for the purposes of the company, the company are not bound to make good its depreciation in value unless the articles provide for its being done. The distinction between capital account and revenue account is shewn in *Lee* v. *Neuchatel Asphalte Company* (1); *Mills* v. *Northern Railway of Buenos Ayres Company* (2). Suppose a railway cost £1,000,000 in making, and then materials lessen in value and wages fall so that it could now be made for half the sum, could any one say that no dividend could be paid until that depreciation was made up? *Lee* v. *Neuchatel Asphalte Company* involves three points: (1.) that the capital account and the revenue account are distinct, and that the excess of revenue may be divided; (2.) that the statutes do not lay down a rule that capital must

(1) 41 Ch. D. 1. (2) Law Rep. 5 Ch. 621, 630.

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be replaced; (3.) that the capital account, if properly drawn, shews only the expenditure of capital, not the valuation of capital, for the company is not a debtor to capital. A company may go on and divide profits even where there is no available capital at all, and Lord Justice *Lindley* has expressed that opinion (1). In *Dent* v. *London Tramways Company* (2) there were ordinary and preference shareholders; the tramway was allowed to get out of repair. *Jessel*, M.R., held that the ordinary shareholders could not receive dividend till the depreciation was made good, but that as to the question whether there was income out of which to pay the preference shareholders only the yearly sum requisite to keep the way in repair was to be deducted from the receipts. The Appellants rely on the *Ebbw Vale Case* (3); but it has no bearing on the point. There was no wish there to reduce the capital for the purpose of enabling the company to pay dividend; the sole object of the application was to make the dividends look better by attributing them to a reduced nominal capital. In *Trevor* v. *Whitworth* (4) Lord *Herschell* says that a creditor cannot complain of any use of the assets which is warranted by the memorandum.

[KAY, L.J.:—In partnership deeds it is common to provide for a valuation of the capital at the end of each year in order to ascertain profits.]

Yes; that must be done where the bulk of the capital consists of articles intended to be sold—thus, in a draper's business, there is no way of ascertaining the profits of a year but valuing the stock at the beginning and end of the year, and bringing the difference into account along with the cash transactions of the year. But the case is quite different where the capital is sunk in something permanent—as, for instance, a tramway—by the use of which profits are to be made. In an ordinary partnership there is sometimes a provision for bringing the business premises into account and allowing for depreciation; but there is no obligation to have such a provision, though it may be a prudent one. The object of the present company is to invest money in

(1) Lindley on Partnership, 3rd Ed. p. 812; 4th Ed. p. 792; Companies Ed. 1889, p. 431.

(2) 16 Ch. D. 344.

(3) 4 Ch. D. 827.

(4) 12 App. Cas. 409.

securities and apply the income received from them according to the articles, and there is no law which prohibits them from distributing among the shareholders the income of the securities they have, although they have lost others. In *Bolton* v. *Natal Land and Colonization Company* (1) the principle of the *Neuchatel Case* (2) was carried out. The declaration of a dividend, then, is within the powers of the company, and whether it shall be declared or not is a matter of internal regulation with which the Court does not interfere.

Kirby, in reply:—

We have to make out that the declaration of a dividend is *ultrà vires*, and we contend that it is. In *Stringer's Case* (3), a shipping company had made, as was supposed, large profits, and a dividend was declared. One of their ships had in fact been lost; but this was not known. The declaration of the dividend was upheld; but it is clear from the language used that it would have been held improper if the loss of the ship had been known. In *Dent* v. *London Tramways Company* (4) the Court recognised the obligation to set apart a sum to meet the depreciation of each year, and the Master of the Rolls says (5): "'Profits for the year' of course mean the surplus in receipts, after paying expenses and restoring the capital to the position it was in on the 1st of January in that year." In the *Neuchatel Case* there had been no loss, so the point did not really arise. The cases tend to the conclusion that profits are to be ascertained by looking to the state of the company at the time, and seeing whether it has become richer or poorer. The profit or loss of a year must be ascertained by that test.

March 20. LINDLEY, L.J., stated that their Lordships were unanimously of opinion that the decision appealed from must be affirmed, but that on account of the importance of the point they would reserve a full statement of their reasons to a future day.

(1) [1892] 2 Ch. 124.
(2) 41 Ch. D. 1.
(3) Law Rep. 4 Ch. 475, 495.
(4) 16 Ch. D. 344.
(5) 16 Ch. D. 354.

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1894. April 7. LINDLEY, L.J.:—

The judgment I am about to deliver is the joint judgment of the Lord Justice *A. L. Smith* and myself.

The broad question raised by this appeal is, whether a limited company which has lost part of its capital can lawfully declare or pay a dividend without first making good the capital which has been lost. I have no doubt it can—that is to say, there is no law which prevents it in all cases and under all circumstances. Such a proceeding may sometimes be very imprudent; but a proceeding may be perfectly legal and may yet be opposed to sound commercial principles. We, however, have only to consider the legality or illegality of what is complained of.

As was pointed out in *Lee* v. *Neuchatel Asphalte Company* (1), there are certain provisions in the *Companies Acts* relating to the capital of limited companies; but no provisions whatever as to the payment of dividends or the division of profits. Each company is left to make its own regulations as to such payment or division. The statutes do not even expressly and in plain language prohibit a payment of dividend out of capital. But the provisions as to capital, when carefully studied, are wholly inconsistent with the return of capital to the shareholders, whether in the shape of dividends or otherwise, except, of course, on a winding-up, and there can, in my opinion, be no doubt that even if a memorandum of association contained a provision for paying dividends out of capital such provision would be invalid. The fact is that the main condition of limited liability is that the capital of a limited company shall be applied for the purposes for which the company is formed, and that to return the capital to the shareholders either in the shape of dividend or otherwise is not such a purpose as the Legislature contemplated.

But there is a vast difference between paying dividends out of capital and paying dividends out of other money belonging to the company, and which is not part of the capital mentioned in the company's memorandum of association. The capital of a company is intended for use in some trade or business, and is necessarily exposed to risk of loss. As explained in *Lee* v. *Neuchatel Asphalte Company*, the capital even of a limited com-

(1) 41 Ch. D. 1.

pany is not a debt owing by it to its shareholders, and if the capital is lost, the company is under no legal obligation either to make it good, or, on that ground only, to wind up its affairs. If, therefore, the company has any assets which are not its capital within the meaning of the *Companies Acts*, there is no law which prohibits the division of such assets amongst the shareholders. Further, it was decided in that case, and, in my opinion, rightly decided, that a limited company formed to purchase and work a wasting property, such as a leasehold quarry, might lawfully declare and pay dividends out of the money produced by working such wasting property, without setting aside part of that money to keep the capital up to its original amount.

There is no law which prevents a company from sinking its capital in the purchase or production of a money-making property or undertaking, and in dividing the money annually yielded by it, without preserving the capital sunk so as to be able to reproduce it intact either before or after the winding-up of the company.

A company may be formed upon the principle that no dividends shall be declared unless the capital is kept undiminished, or a company may contract with its creditors to keep its capital or assets up to a given value. But in the absence of some special article or contract, there is no law to this effect; and, in my opinion, for very good reasons. It would, in my judgment, be most inexpedient to lay down a hard and fast rule which would prevent a flourishing company, either not in debt or well able to pay its debts, from paying dividends so long as its capital sunk in creating the business was not represented by assets which would, if sold, reproduce in money the capital sunk. Even a sinking fund to replace lost capital by degrees is not required by law.

It is obvious that dividends cannot be paid out of capital which is lost; they can only be paid out of money which exists and can be divided. Moreover, when it is said, and said truly, that dividends are not to be paid out of capital, the word "capital" means the money subscribed pursuant to the memorandum of association, or what is represented by that money. Accretions to that capital may be realized and turned into

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money, which may be divided amongst the shareholders, as was decided in *Lubbock* v. *British Bank of South America* (1).

But, although there is nothing in the statutes requiring even a limited company to keep up its capital, and there is no prohibition against payment of dividends out of any other of the company's assets, it does not follow that dividends may be lawfully paid out of other assets regardless of the debts and liabilities of the company. A dividend presupposes a profit in some shape, and to divide as dividend the receipts, say, for a year, without deducting the expenses incurred in that year in producing the receipts, would be as unjustifiable in point of law as it would be reckless and blameworthy in the eyes of business men. The same observation applies to payment of dividends out of borrowed money. Further, if the income of any year arises from a consumption in that year of what may be called circulating capital, the division of such income as dividend without replacing the capital consumed in producing it will be a payment of a dividend out of capital within the meaning of the prohibition which I have endeavoured to explain.

It has been already said that dividends presuppose profits of some sort, and this is unquestionably true. But the word "profits" is by no means free from ambiguity. The law is much more accurately expressed by saying that dividends cannot be paid out of capital, than by saying that they can only be paid out of profits. The last expression leads to the inference that the capital must always be kept up and be represented by assets which, if sold, would produce it; and this is more than is required by law. Perhaps the shortest way of expressing the distinction which I am endeavouring to explain is to say that fixed capital may be sunk and lost, and yet that the excess of current receipts over current payments may be divided, but that floating or circulating capital must be kept up, as otherwise it will enter into and form part of such excess, in which case to divide such excess without deducting the capital which forms part of it will be contrary to law.

The *Companies Acts* do not require even limited companies to keep accounts, still less to keep them in any particular form.

(1) [1892] 2 Ch. 198.

The only enactment on the subject is sect. 26 of the *Companies Act*, 1862, and Form E in the second schedule, and these relate solely to the nominal capital and calls. But, although this is so, yet, as a matter of business, accounts of some sort must be kept; and in order to shew what has been subscribed by the shareholders and what has become of the money so subscribed, and to shew the results of the company's trading or business, it is practically necessary to keep a capital account and what is called a profit and loss account, and as a matter of business these accounts ought to be kept as business men usually keep them. Accordingly, we find provisions for keeping such accounts in Table A in the Appendix to the *Companies Act*, 1862 (see articles 78–82), and in the articles of association of most, if not all, companies. But there is no law which compels limited companies in all cases to recoup losses shewn by the capital account out of the receipts shewn in the profit and loss account, although care must be taken not to treat capital as if it were profit. This is in accordance with *Bolton* v. *Natal Land and Colonization Company* (1), which is the latest reported case on the subject. Further, it is obvious that capital lost must not appear in the accounts as still existing intact. The accounts must shew the truth, and not be misleading or fraudulent.

The Acts of 1867 and of 1877 are in no way inconsistent with these observations. They provide for the reduction of the nominal capital mentioned in the memorandum of association. They do not render it obligatory on a company which has lost some of its capital to reduce the nominal amount mentioned in its memorandum. There are advantages in doing so, and the Acts were passed to enable limited companies to obtain these advantages, but there is nothing in these Acts, any more than in the Act of 1862, which prevents a company which has lost part of its capital from continuing to carry on business and declaring and paying dividends. A law forbidding this may well have been considered by the Legislature far too rigid, and in their desire to check dishonest and reckless trading Courts must be careful not to put tighter fetters on companies than the Legislature has authorized.

(1) [1892] 2 Ch. 124.

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It follows from what has been said above that the proposed payment of dividend in this particular case cannot be restrained. Mr. Justice *Stirling* has, in his judgment, examined the memorandum and articles of association so fully that I do not think it necessary to examine them again. It is plain there is nothing in them which requires lost capital to be made good before dividends can be declared: on the contrary, they are so framed as to authorize the sinking of capital in the purchase of speculative stocks, funds, and securities, and the payment of dividends out of whatever interest, dividends, or other income such stocks, funds, and securities yield, although some of them are hopelessly bad, and the capital sunk in obtaining them is lost beyond recovery: (see the memorandum of association (*i.*) and articles 84 and 85). There is no suggestion of any improper juggling with the accounts, and there is no payment of dividend out of capital. There is no insolvency, and we have not to deal with a petition to wind up. Some capital is lost, but that is all that can be truly said, and that is not enough to justify such an injunction as is sought. The appeal must be dismissed with costs.

KAY, L.J.:—

I should be sorry if it were held that a joint stock trading company can properly estimate their profits in any way differing from that in which an individual or a partnership of individuals carrying on a similar business would do.

An ordinary trader takes a yearly account of all the capital employed in his business, allows for any loss or depreciation in value, and carries the balance to the profit and loss account from which he makes out the profit or loss of the year. In this mode a loss or depreciation of such capital affects directly the profit of the year, which is thereby diminished. But, if upon the whole capital account there is a gain, this goes to swell the year's profits.

In my opinion a joint stock trading company should do the same. The question in this case is whether the capital employed by this company in making investments is capital employed in the business for the purpose of this usual mode of taking the year's account.

If the company were formed for the purpose of buying stocks, shares, and the like to sell again, and their business was to make profit on such resale, it is obvious that any profit or loss on such transactions must be estimated in the way I have stated. But this is not their business. They buy stocks, shares, and the like, and they have power to sell and change them. But they buy as investments, and do not look to the sale as the source of their profit. They buy, we are told, all sorts of investments which nominally pay a large rate of interest—those, in short, in which a prudent man would not invest his own money, and the source of their profit is that having very large funds intrusted to them by the confiding public, they are able out of the income of these investments to pay in most years something more to their shareholders than the 3 or 4 per cent. which represents at present the utmost income that can be obtained from safe securities. The natural result of such a reckless dealing with the moneys intrusted to them has followed in this case. There has been an actual loss of invested capital to the amount of about £75,000. If the depreciation below the cost price of other investments be added to this, the loss is much greater. This company seems to have been courting the fate which has overtaken other similar companies which are now in liquidation. The company have power by their articles to form out of income a reserve fund before declaring any dividends, and if they were to do this in order to make good the loss they have sustained, the directors would be acting within their powers; so, if the capital had been increased by a rise in value of the investments, I conceive that they might have realized some part of that increase, and distributed it as dividend. The question is whether they were compellable to do either of these things.

It is argued that in the events that have happened, if they do not replace the lost capital out of income, they will in effect be paying dividends out of capital. That is only another mode of trying the same question. If they are not bound so to replace the lost capital, they may divide the whole income among the shareholders without devoting any of it to this purpose. I have not a very confident opinion in the matter, but on the whole I am not satisfied that there is any legal obligation on the directors to do

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this. The persons who have been so foolish as to take shares in this company seem to me, with their eyes open, to have entered upon a reckless and dangerous speculation, involving an almost certain loss and depreciation of capital. They seem to me to have authorized their trustees to make the investments which they have made. In the case of any ordinary trust it is not the right of any *cestui que trust*, where an authorized investment has failed, to require that it should be replaced out of the income of the remaining investments. That would be sacrificing the interest of a tenant for life to that of the remaindermen. In this company the effect would be to give the deferred shareholders a benefit out of the income of the preference shareholders. I do not think this was the intention. [His Lordship here read clause 3 (*i.*) of the memorandum of association, and clauses 84 and 85 of the articles, and proceeded:—]

These provisions seem to me to mean that any income received may be divided, whether part of the capital is lost or not. At present I do not know of any law to prevent this, and it might be difficult to frame such a law without unduly interfering with the liberty of commercial proceedings. I have no sympathy whatever with those who have become shareholders in such an undertaking. The objects and the effect of the operations of such companies is to give a fictitious value to other speculations as unsound as their own, by keeping up the market price of the stocks and shares in which it is their business to invest, and the sooner it is generally understood what the probable result of such transactions may be, the better it will be for the commercial and investing classes in general.

Solicitors: *E. Flux, Leadbitter, & Paterson; Ashurst, Morris, Crisp & Co.*

H. C. J.

In re LUMLEY.
Ex parte CATHCART.

C. A.
1894
April 11.

Costs—Enforcing Payment of—Sequestration—Rules of Supreme Court, 1883, *Order* XLII., *r.* 6; *Order* XLIII., *rr.* 6, 7.

Where an order has been made directing a party to pay costs without limiting any time for payment, and the costs have been taxed, an immediate sequestration to enforce payment of them can be issued by leave of a Judge, and it is not necessary that there should be any previous four day order; but an order directing an attachment or sequestration on a future uncertain event, *e.g.*, on default of payment within a specified time, is wrong in form.

SEVERAL applications by Mrs. *Cathcart* having been refused with costs, the costs were taxed, but she declined to pay them. Mr. *H. H. Hood-Barrs*, to whom they were payable, applied for a sequestration, and on the 15th of January, 1894, Mr. Justice *North*, in Chambers, made an order for a sequestration, which was drawn up in the following form:—

"That the Respondent, *Mary Cathcart*, do pay to the said *H. H. Hood-Barrs* within four days after service of this order" [here followed particulars of the amounts of the taxed costs] "and in default of such payment it is ordered that the said *H. H. Hood-Barrs* be at liberty to issue a writ of sequestration against the separate estate of the said *M. Cathcart* not subject to any restriction on anticipation, unless by reason of sect. 19 of the *Married Women's Property Act*, 1882, the property shall be liable to sequestration notwithstanding such restriction."

Mrs. *Cathcart* applied to Mr. Justice *North* to set aside this order, and the application was refused with costs. Mrs. *Cathcart* appealed.

Mrs. *Cathcart* in person for the appeal. [The Court asked how an order in this prospective form could be justified.]

Swinfen Eady, Q.C., and *H. Terrell*, for the Respondent:—

The order is drawn up in a form which is open to question; but the immediate issue of a sequestration for costs is authorized

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by Order XLIII., rule 7, and this is in fact an order for sequestration with a provision suspending its operation for four days. [*Snow* v. *Bolton* (1) was referred to.]

LINDLEY, L.J.:—

This is an appeal from an order of Mr. Justice *North* refusing to discharge an order dated the 15th of January, 1894, which I will read. [His Lordship read the order.]

We have to consider this order as regards its form and also upon the merits. The form of the order appears to me to be obviously wrong. I do not think that it is competent for any judge to make an order for an attachment or for sequestration upon a future uncertain event. He ought to exercise his judgment as to whether a sequestration should issue upon the facts brought before him at the time when he has to exercise his judgment and discretion, and to make an order for attachment or for sequestration conditionally appears to me to be contrary to law. If that were all we should set aside this order with costs. But that is not all. Upon inquiry the facts appear to be as follows. There were certain orders ordering Mrs. *Cathcart* to pay Mr. *Hood-Barrs* certain costs. She refused to pay them. An application therefore was made to Mr. Justice *North* for leave to issue a sequestration under Order XLIII., rule 7, to which I will presently refer more particularly; and what Mr. Justice *North* intended to do was to give leave to issue that writ of sequestration then and there, but as a matter of concession and grace to Mrs. *Cathcart* to give her four days to pay these costs if she chose. The proper method of giving effect to that intention would have been to direct the order not to be drawn up for four days, or to direct that it should lie in the office for four days, or something of that kind, and it is by inadvertence that a four day order has been engrafted into an order for sequestration. That raises the question whether Mr. Justice *North* had jurisdiction to order a writ of sequestration to issue without a four day order. That depends upon the general Order XLIII., rule 7.

In the first place, Order XLII., rule 6, prohibits by implication

(1) 17 Ch. D. 433.

the issue of a writ of sequestration for the non-payment of money pursuant to a judgment. Then Order XLIII., rule 6, which deals with sequestration, runs thus: "Where any person is by any judgment or order directed to pay money into Court or to do any other act in a limited time, and after due service of such judgment or order refuses or neglects to obey the same according to the exigency thereof, the person prosecuting such judgment or order shall, at the expiration of the time limited for the performance thereof, be entitled, without obtaining any order for that purpose, to issue a writ of sequestration against the estate and effects of such disobedient person." This rule does not apply to a judgment for payment of money where no time is fixed by the judgment; but it does not follow that you cannot get what is commonly called in the Chancery practice a four day order limiting the time, and then, on non-compliance with that order, issue sequestration under Order XLII., rule 6

Now, that order does not necessarily apply to orders for costs, and the mode of enforcing payment of them involves a point of some little historical curiosity. Under the old Chancery practice payment of costs might be enforced by a four day order and attachment, but the more common method was to issue a subpœna for costs, which directed the person to pay them immediately upon the service of that subpœna. Upon proof of service and non-payment pursuant to the terms of the subpœna an attachment issued, and then an order for sequestration. That was altered by Order XLIII., rule 7, which says: "No subpœna for the payment of costs, and, unless by leave of the Court or a Judge, no sequestration to enforce such payment, shall be issued." The effect of that was to abolish the subpœna for costs, and to prevent the person who has the order for costs from going to the office and getting a writ of sequestration as a matter of course. For that was substituted a special application to the Judge for leave to issue sequestration. Putting those rules together, and bearing in mind the old practice that the subpœna never specified the particular date of payment, it seems to me that the practice which has prevailed ever since 1883 is right—that is to say, that an order for a sequestration to issue for costs can be made on special application to the Judge without any four day order

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having been made. Therefore, Mr. Justice *North* had jurisdiction, upon proof of the facts before him, to order this sequestration to issue; and although the form of the order is wrong, the right way of dealing with it is, not to discharge that part of the order which he intended to make, and which he might have made, but to vary the order by striking out the four day order, which ought never to have been inserted, and the order will stand as a simple order for leave to issue sequestration. Mrs. *Cathcart* being right in form, although not in substance, we will direct the order to be varied, but she will have no costs.

LOPES, L.J.:—

We have here to deal with an order for costs, and, in my opinion, therefore, it is only necessary to deal with rule 7 of Order XLIII. By leave of a Judge a sequestration to enforce payment of costs may be issued, and it is not necessary to put in the order any particular time for payment. The old practice of enforcing orders for payment of costs was by a subpœna followed by a sequestration. That old practice is abolished by Order XLIII., rule 7. Under that old practice it is to be observed no time was fixed for payment, and it was not necessary to fix any time for payment, and under the new practice it is unnecessary to fix a time for payment. In point of fact, the leave of the Judge is substituted for the old subpœna, which, as I have already said, fixed no time for payment.

Now, turning to the order which is before us, it appears to me that in its present form Mr. Justice *North* had no jurisdiction to make it. He was, in point of fact, making an anticipatory order, which he had no power to make; but the matter has been inquired into, and we find that he really intended to make an order for immediate sequestration, but to give the four days as matter of grace to Mrs. *Cathcart*. The order, therefore, is not in proper form, but it is perfectly clear, having regard to rule 7 of Order XLIII., that Mr. Justice *North* had jurisdiction to order a writ of sequestration to issue. I am of opinion, therefore, that the order must be amended in the way that has been indicated by my Brother *Lindley*, and that there should be no costs, having regard to the fact that, although Mrs. *Cathcart* is in substance

wrong, still the form of the order is not that which it should have been.

KAY, L.J.:—

I agree.

LINDLEY, L.J.:—

We had better vary the order and confirm it as varied. That will save all dispute as to the validity of the sequestration.

Solicitors: *Hood-Barrs & Co.*

H. C. J.

CHITTY, J.
1894
April 13, 14, 17

In re PINHORNE.
MORETON *v.* HUGHES.

[1893 P. 2698.]

Will—Construction—Lapse—Settlement of Shares—Death of Legatee in Testator's Lifetime.

A testator directed his trustees to stand possessed of his residuary estate in trust for his four sisters (by name) in equal shares, "Provided always and I declare that my trustees shall retain the share of each of my sisters of and in the residuary trust funds upon the trusts following," which were, to pay the income thereof to such sister for life, with power to appoint a life interest to a husband, and after her death for her children at twenty-one or marriage, and in default of children who should attain a vested interest, for such persons as should be next of kin to her at her decease. One of the sisters having predeceased the testator, leaving infant children:—

Held, that the share of the deceased sister had not lapsed, and that the infants were entitled to it contingently on their attaining twenty-one or marriage.

Stewart v. *Jones* (1) and *In re Roberts* (2) distinguished.

ADJOURNED SUMMONS.

Henry Stanley Pinhorne, who died in October, 1892, by his will, made in April, 1885, gave, devised and bequeathed all his real and personal estate to his trustees, thereinafter named, upon trust for sale and conversion, and after payment of his debts, funeral and testamentary expenses and legacies, he directed the trustees to stand possessed of the said residuary trusts moneys, and the investments for the time being representing the same, (thereinafter called the residuary trust funds) "In trust for my four sisters, *Eveline Hughes, Florence Pinhorne, Cecil Kerr*, and *Adela Pinhorne*, in equal shares. Provided always and I declare that my trustees shall retain the share of each of my sisters of and in the residuary trust funds upon the trusts following, that is to say—upon trust to pay the income thereof to my same sister during her life, without power of anticipation," but with power by deed or will to appoint the whole, or any part, of such income to any husband who might survive her, for his life, and after the death of such sister, and

(1) 3 De G. & J. 532. (2) 30 Ch. D. 234.

subject to any appointment which might be made to her husband, in trust for the children of such sister, who being male should attain twenty-one years, or being female should attain that age or marry, in equal shares; and in default of children who should attain a vested interest, "In trust for the person or persons who under the statutes of distribution of the effects of intestates would be entitled thereto in case my same sister had died possessed thereof intestate and without having been married."

Eveline Hughes, one of the testator's four sisters, predeceased him, having died on the 4th of August, 1885, leaving a husband and three infant children; and the trustees of the will now applied, by originating summons, for the determination of the question whether one-fourth share of the residuary trust funds had lapsed, or whether the infant children were entitled to it contingently on their attaining twenty-one or marrying.

Underhill, for the trustees.

Badcock, for the infant children of *Eveline Hughes*:—

The effect of the gift, as a whole, is to give a life interest only to each sister, with a settlement on her children after her death, whether in the testator's lifetime or not makes no difference. The case of *Stewart* v. *Jones* (1) is distinguishable, because the gift there was to a class, and the settlement directed was, of the shares to which the testator's daughters "shall become entitled." *In re Roberts* (2) is also distinguishable, because it was to be a settlement of the share which the niece took, and in the event which happened, the niece did not live to take any share.

In re Speakman (3) is in my favour. [*Jarman* on Wills (4) was also cited.]

The settlement in this case was a continuation of the gift, and there has been no lapse.

Macnaghten, for the next of kin:—

The will contains an absolute gift of a fourth share to each sister, with a direction to settle this share, which can only

(1) 3 De G. & J. 532.
(2) 30 Ch. D. 234.
(3) 4 Ch. D. 620.
(4) 5th Ed. vol. ii. p. 1576.

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operate on the share each sister takes. *Eveline Hughes* did not live to take anything, therefore the settlement did not take effect; and her children can take nothing; there has been a lapse.

In re Roberts (1) is analogous to, and governs, the present case. The ultimate limitation to the sisters' next of kin tends to shew that the testator contemplated that his sister, whose share was settled, was to be a sister who survived him, for it would be, as *Cotton*, L.J., says (2), a whimsical provision to give it to the persons who were next of kin of a sister who died before him. The testator gave this share to his sister, but has only settled it in case she survives him. She has not survived, and there is therefore an intestacy. The present case is undistinguishable from *In re Roberts.*

CHITTY, J.:—

The argument for the intestacy stands thus: It is said, here is an absolute gift of a fourth share to each of the testator's sisters; that is followed by a settlement affecting only that which each sister takes, and nothing is settled except what the sister does take. But one of the four sisters named having died in the lifetime, the law of lapse applies; she takes nothing, consequently nothing is settled.

Now, it is a pertinent question on this will to ask, What interest the sister, *Eveline*, would have taken, if she had survived? It seems to me that one answer, and one answer only, can be given to that—namely, a life interest, and a life interest only; the meaning of a testator is to be ascertained by the words which he has used. The various parts of the will must be taken into consideration, the whole must then be put together, and on a just consideration of all the parts as a whole, the Court arrives at the testator's intention.

Now, this will begins with the trusts for the four sisters named, in equal shares, and the observation commonly made is at once admitted, that if that clause stood alone, *Eveline* would have taken an absolute interest. But it does not stand alone. The testator goes on immediately with a proviso and a decla-

(1) 30 Ch. D. 234. (2) 30 Ch. D 237.

ration. The trusts which are declared exhaust the whole beneficial interest; under those trusts, she takes a life interest, with power to appoint to her husband after her death; then follows a trust for her children, and in default of children, a trust for the persons who, under the *Statute of Distributions*, would be entitled to her estate. It is not necessary to read the whole of that trust. The effect, therefore, is to my mind plain. The sister takes only a life interest in a fourth share. What is the meaning of the term "the share of each of my sisters" in the proviso and declaration? The answer seems to me to be, the fourth share in which, on a just construction of the whole will, she takes a life interest only. Following the most technical method of construction, I say, that the proviso and the declaration cut down the apparent absolute interest, as given in the first instance. To be definite, the proviso cuts it down, and the declaration shews what the testator's intention really is. Paraphrasing the testator's words, without reading them, he in effect says: "I do not mean her to have it; I mean it to go according to the declaration." The result, then, is that the first trust on this will is introduced merely for the purpose of the division of the fourth share. I see no difficulty in interpreting, in strict accordance with the language of the testator, the words "the share of each of my sisters." The fourth share means, that which I have just now apparently given her, but which I shew by my will I do not intend for her except in the way hereinafter mentioned—that is to say, it is a fourth share, to be settled on her in such a manner that she takes a life interest only in it.

The result then is, in my opinion, that the death of *Eveline* in the testator's lifetime has not displaced the settlement. Of course the testator anticipated, as testators always do, that the object of his bounty would survive. But in effect he has given her a life interest; that has come to an end by her death, and by her death no doubt in his lifetime. I think the settlement is well effected and stands.

Although some observations may be made in regard to the ultimate trust for the next of kin, and though possibly it may be open to the observation made by *Cotton*, L.J., in *In re Roberts* (1),

(1) 30 Ch. D. 237.

CHITTY, J. 1894 *In re* PINHORNE MORETON *v* HUGHES.

that it is somewhat "whimsical," yet I am not impressed with the force of any such observation. I see no difficulty in giving effect to this trust, if it should hereafter arise.

Now, the authorities cited in support of the argument for an intestacy do not in my view apply. In *Stewart* v. *Jones* (1) the gift was to a class, viz., to the testator's own children. The 33rd section of the *Wills Act* does not apply to such a gift, and only such persons as survived the testator could under the form of the gift, and I may add, the substance of the gift, take a share.

But, passing that by, the settlement was in terms a settlement of the share which each of the testator's daughters, on her attaining the age of twenty-one years, or marrying under that age "shall" (I am reading the words) "become entitled to under the trusts aforesaid." The difficulty in the case was, to say that the daughter who had died in the testator's lifetime had "become entitled under the trusts aforesaid" to a share.

Now, the words I have to deal with in this case are not similar words. The declaration is a settlement of the share as I have read it. It is not a settlement of the share which the sister "shall become" entitled to.

The other case of *In re Roberts* (2) was a case of a gift to nephews and nieces named, and so far is like the present case; but that was followed by a provision that in case any of them should die under the age of twenty-one, his or her share, whether original or accruing, should go to the others of them. As was observed by the learned Judges who dealt with it, if a niece had died under twenty-one leaving children, the children could not have taken. The key of the judgment, I think, which I do not consider it necessary to read at length, is to be found in what Lord Justice *Lindley* said (3), "You cannot read it as a settlement of one-fourth, but as a settlement of the share which the niece takes."

Now, in the case of *In re Roberts*, it was impossible for the Court to arrive at the conclusion that it was not proper to read the gift to the nephews and nieces named, with that divesting

(1) 3 De G. & J. 532. (2) 30 Ch. D. 234.
(3) 30 Ch. D. 238.

clause to which I have referred, as amounting to a direction to divide the estate in shares. That appears to me to be a cardinal distinction between that case and the one that I have to deal with.

I think, for the reasons that I have given in the earlier part of this judgment, that it is a proper and just thing, having regard to the language of the testator, to say that the clause which would apparently give an absolute interest stands, merely for the purpose of notional division, in fourths. The result, therefore, is that I hold that there is no intestacy, to this extent, that the children are entitled to contingent interests according to the form of the declaration. I will say nothing at the present moment with regard to the ultimate limitation. No question may arise hereafter, but I can conceive that a possible question might have to be discussed upon that clause, if ever it should be necessary to submit it for consideration.

Solicitors: *Ullithorne, Currey, & Villiers*, agents for *Neve, Cresswell, & Sparrow, Wolverhampton*; *Crowders & Vizard*, agents for *Shore & King, Birmingham*; *Bower, Cotton, & Bower*, agents for *Radford, Gill, & Radford, Manchester*.

W. C. D.

NORTH, J.
1894
March 15, 16.

In re BOOTH.
BOOTH *v.* BOOTH.

[1893 B. 3833]

Will—Construction—Gift to Wife for life, "for her use and benefit and for the maintenance and education of my children"—Right of Adult Children to Maintenance during Life of Widow.

A testator gave the residue of his estate to his executors, on trust to pay to his wife or permit her to receive the annual income thereof during her life, "for her use and benefit and for the maintenance and education of my children," and after her decease upon trust to divide his residuary estate equally between all his children living at his decease:—

Held, that the wife took the income subject to a trust for the maintenance and education of the children, and that the trust was not limited to children under twenty-one or unmarried.

All the children having attained twenty-one, one of the daughters having married, and the widow having become bankrupt, two unmarried daughters, who were living with their mother, issued a summons asking the Court to determine whether they were entitled to be maintained out of the income of the residue during the remainder of their mother's life. A similar summons had been issued by the married daughter.

The Court directed an inquiry whether any, and, if any, which, of the children required maintenance.

SUMMONS by two of the daughters of *William Booth*, who died on the 12th of November, 1876, to determine whether the Plaintiffs were entitled to be maintained out of the income of the residuary estate of their father during the remainder of the life of *Jane Booth*, his widow, the mother of the Plaintiffs.

By his will, dated the 15th of August, 1870, *William Booth*, who was a coal merchant, after giving all his household furniture and effects to his wife *Jane Booth* absolutely, gave the residue of his estate and effects to his executors and executrix, upon trusts for conversion and investment of the proceeds, and to pay to his wife or permit her to receive the annual income thereof during her life, for her use and benefit, and for the maintenance and education of his children, and from and after her decease upon trust to divide his said residuary estate equally between and amongst all his children living at his decease, their executors

or administrators. And the testator directed that the said shares should be payable to each of his children after his wife's decease upon their having attained or attaining the age of twenty-one years.

And the testator directed that his wife should have power to appoint and give to any of his children during her life who might attain twenty-one any portion of such child's share, but not exceeding one moiety, and should also be at liberty, if she should think fit, to appoint and pay to or for the advancement in life or benefit of any of his said children before attaining twenty-one any sum not exceeding one moiety of the share to which any such child would be entitled. And the testator appointed his wife *Jane Booth* and his brothers *D. H. Booth* and *C. A. Booth* executrix and executors in trust of his will.

The testator left surviving him his wife *Jane Booth* and seven children, viz., *Elizabeth Sarah*, born in 1858; *Edwin*, born in 1860; *Alice Jane*, born in 1862; *Gertrude Mary*, born in 1864; *Horace*, born in 1867; *Hannah Sophia* (one of the Plaintiffs), born in 1868; and *Ethel Ada* (the other Plaintiff), born in 1870. At the date of the issue of this summons the children had all attained twenty-one. One of the daughters had married. The widow had exercised the power of appointment given to her by the will in favour of the five elder children, but she had not made any appointment in favour of the Plaintiffs.

After the death of the testator, the widow and her son *Edwin* carried on the testator's business in partnership together. On the 20th of July, 1893, they executed an assignment of all their property to trustees for the benefit of their creditors, and they were afterwards adjudicated bankrupts.

The Defendants to the summons were the widow and *C. A. Booth*, who were the surviving executors; the son *Edwin Booth*; and the trustee in the bankruptcy. *C. A. Booth* and *Edwin Booth* were the present trustees of the will.

Swinfen Eady, Q.C., and *Foster Cooke*, for the Plaintiffs:—

The words of the gift to the widow create a trust for the benefit of all the testator's children who require maintenance or education. The words do not simply express the motive of the

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gift. The trust for the maintenance is not confined to children who are under age or unmarried. The Plaintiffs require maintenance, and the Court will declare that they are entitled to it, and will direct an inquiry how much of the income ought to be applied for their benefit: *Longmore* v. *Elcum* (1); *Carr* v. *Living* (2); *Carr* v. *Living* (No. 2) (3); *Berry* v. *Briant* (4); *Wilkins* v. *Jodrell* (5).

Everitt, Q.C., and *Macnaghten*, for the trustee in the bankruptcy:—

There is no trust for the children; there is nothing more than an expression of the motive of the testator in making the gift to his wife: *Thorp* v. *Owen* (6); *Scott* v. *Key* (7); *Byne* v. *Blackburn* (8); *Lambe* v. *Eames* (9); *Bond* v. *Dickinson* (10); *Mackett* v. *Mackett* (11). With the exception of *Longmore* v. *Elcum* there is no reported case in which words like these have been held to create a trust. The other cases cited are distinguishable.

Leverson, for the trustees of the will.

NORTH, J. (after stating the provisions of the will, continued):—

The testator's widow has become bankrupt, and all her interest under the will has passed to the trustee in the bankruptcy. He claims to be entitled to the whole of the income of the residue of the testator's estate, without making any provision out of it for the maintenance or education of the testator's children. There are several children of the testator, and all of them have attained twenty-one, and one of the daughters has married. The suggestion on behalf of the trustee in the bankruptcy is, that the words I have read simply mean that the widow might spend the income on the children if she liked. Of course she could. The words are, in my opinion, inserted with the view, not that she should spend the income for any purpose she liked, but that she

(1) 2 Y. & C. Ch. 363.
(2) 28 Beav. 644.
(3) 33 Beav. 474.
(4) 2 Dr. & Sm. 1.
(5) 13 Ch. D. 564.
(6) 2 Hare, 607.
(7) 35 Beav. 291.
(8) 26 Beav. 41.
(9) Law Rep. 6 Ch. 597.
(10) 33 L. T. (N.S.) 221.
(11) Law Rep. 14 Eq. 49.

should have it for her use and benefit, and also "for the maintenance and education of my children." That was the object to which the money was to be applied. In my opinion, those words were inserted for the purpose of shewing the object, or intention, or trust, whichever you choose to call it, with or upon which the testator made the gift to his wife. Suppose the gift had been made to a stranger for his use and benefit, and for the maintenance and education of the testator's children, could there have been any doubt that he would have taken the income subject to a trust for the maintenance and education of the children? No doubt the widow takes a share in the income; but I cannot say that the children are excluded from all interest, any more than I could if the widow had been a trustee—for she is a trustee—for any other persons.

Then it is said, that, if there be a trust for the children, it is confined to the period of their minority. But, in my opinion, it is settled that such a trust as this is not confined to minority. Mr. *Eady* cited cases in which the language is undistinguishable from that in the present case; it is substantially the same. Mr. *Everitt* also cited cases in which the words are substantially the same as those I have here. This only illustrates how difficult it is for two minds to arrive at the same conclusion even on similar words. In arriving at a conclusion upon the words used by the testator in the present case, I do not follow the cases which have been cited by Mr. *Eady* as precedents binding upon me; but the reasoning of them commends itself to my mind; and, therefore, I think that there is here a trust for the maintenance of the children, and that that trust is not confined either to children who are under twenty-one or to children who are unmarried. It is not, however, a trust for all the children equally; some may take nothing at all. The widow has a discretion as to the amount to be applied for each child. If there are children who do not require maintenance, they are not to have any of the income: a discretion is given to the widow. In my opinion, a *primâ facie* case has been made out by the Plaintiffs that they are entitled to be paid a part of this income. But I do not see how the widow, or rather the trustee in her bankruptcy, can be excluded altogether.

NORTH, J.
1894
In re BOOTH. BOOTH *v.* BOOTH.

In my opinion, the proper thing to do is to direct an inquiry what is the property in the hands of the trustees of the will, and what is the income thereof: whether any, and if any what, advances have been made to any, and if any which, of the children on account of their respective shares under the will; and whether any, and if any what, provision ought to be made for the "maintenance" (I leave out "education") of any, and if any which, of the children of the testator out of the income of the testator's estate.

Solicitors: *Stoker, Tattersall, & Hunt; Beale & Co.; Bird & Eldridge.*

W. L. C.

NORTH, J.
1894
April 5.

BARTLETT *v.* WEST METROPOLITAN TRAMWAYS COMPANY.

[1893 B. 2878.]

Tramway Company—Debenture-holders' Action—Order for Sale of Undertaking of Company—Tramways Act, 1870 (33 & 34 *Vict. c.* 78), *s.* 44.

A tramway company was incorporated by a special Act, with which sect. 44 of the *Tramways Act,* 1870, was incorporated. In an action by debenture-holders of the company to enforce their security, which comprised the undertaking of the company and all the tolls and sums of money arising therefrom:—

Held, that the Court had jurisdiction to order the undertaking and tramway of the company to be sold as a going concern, subject to the consent of the Board of Trade.

MOTION by the Plaintiffs for an order for the sale of the undertaking of the Defendant company.

The action was brought by the Plaintiffs, on behalf of themselves and all other the holders of mortgage debentures issued by the Defendants, to enforce the security created by the debentures.

On the 24th of August, 1893, an order was made appointing a receiver and manager on behalf of the debenture-holders of all the property and undertaking of the company comprised in or subject to the mortgage debentures, and also to manage the

tramways and generally to carry on the undertaking and business of the company comprised in the mortgage debentures.

On the 11th of November, 1893, judgment was given in the action, declaring that the Plaintiffs, and the other holders of the mortgage debentures of the company, were entitled to a charge on all the property and undertaking of the company comprised in or charged by the debentures. And it was ordered that the following accounts and inquiries should be taken and made, viz., (1.) an account of what was due to the Plaintiffs and the other holders of the debentures on the security thereof and for their taxed costs of the action; (2.) an inquiry who were the holders of the debentures; (3.) an inquiry of what the property comprised in and charged by the debentures consisted.

The Chief Clerk by his certificate, filed the 20th of February, 1894, found that the sums due to the Plaintiffs and the other holders of debentures on the security thereof for principal and interest amounted in the whole to £34,079 5*s.* 11*d.* He stated the names of the holders of the debentures and the amounts due to them respectively, and he found that the property comprised in and charged by the debentures consisted of the undertaking of the company, and all the tolls and sums of money arising therefrom, and all the estate, right, title and interest of the company in the same.

By their notice of motion the Plaintiffs asked that the undertaking of the company, and all the tolls and sums of money arising therefrom, and all the estate, right, title and interest of the company in the same, might be sold as a going concern.

The motion came on for hearing with the further consideration of the action.

The company was incorporated by the *West Metropolitan Tramways Act*, 1882 (45 & 46 Vict. c. ccv.). By sect. 2, Parts II. and III. of the *Tramways Act*, 1870, were incorporated with the special Act.

By sect. 44 of the Act of 1870 (which occurs in Part III. of that Act), it is enacted as follows:—

"Where any tramway in any district has been opened for traffic for a period of six months the promoters may, with the consent of the Board of Trade, sell their undertaking to any

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BARTLETT v. WEST METROPOLITAN TRAMWAYS COMPANY.

person, persons, corporation, or company, or to the local authority of such district; and when any such sale has been made all the rights, powers, authorities, obligations, and liabilities of such promoters in respect to the undertaking sold shall be transferred to, vested in, and may be exercised by, and shall attach to the person, persons, corporation, company, or local authority to whom the same has been sold, in like manner as if such tramway was constructed by such person, persons, corporation, company, or local authority under the powers conferred upon them by special Act, and in reference to the same they shall be deemed to be the promoters."

Cozens-Hardy, Q.C., and *Gregson*, for the Plaintiffs:—

The Court has jurisdiction to make the order for sale. Sect. 44 of the *Tramways Act*, 1870, expressly authorizes the company to sell their undertaking, and therefore the difficulty which arose in *Gardner* v. *London, Chatham, and Dover Railway Company* (1) does not exist here. In *Hope* v. *Croydon and Norwood Tramways Company* (2) an order was made on the 24th of June, 1889, on the further consideration of the action, for the sale of "the undertaking, tramways, and real and personal property of the Defendant company as a going concern."

Vernon R. Smith, for the company, did not oppose the making of an order for sale, but referred to *In re Borough of Portsmouth Tramways Company* (3), in which Mr. Justice *Stirling* expressed a doubt whether there was jurisdiction to make an order for the sale of the undertaking of a tramway company, the company not being in liquidation.

Bompas, Q.C., for the vestry of *Hammersmith*.

[NORTH, J., held that the vestry had no *locus standi*.]

Cozens-Hardy, in reply:—

The question of jurisdiction did not really arise in that case, and it does not appear that the attention of Mr. Justice *Stirling* was directed to the provisions of sect. 44.

(1) Law Rep. 2 Ch. 201. (2) Unreported. (3) [1892] 2 Ch. 362.

NORTH, J.:—

In my opinion there is power to realize the Plaintiffs' security for their debt by means of a sale of the company's undertaking. If there had been in the Act anything to prohibit a sale of the undertaking I could understand the difficulty which has been suggested. But sect. 44 expressly says that the undertaking may be sold, and I can see no difficulty in making the order for sale which is asked for. The order will be as in *Hope* v. *Croydon and Norwood Tramways Company*, and will of course be made subject to the consent of the Board of Trade.

Cozens-Hardy, for the Plaintiffs:—

It is desired that the sale should take place out of Court.

NORTH, J.:—

I do not see any reason why I should now direct that the sale should be out of Court, but there will be nothing to prevent the Plaintiffs from endeavouring to obtain an offer out of Court, and, if they obtain a reasonable offer, they can always bring it before the Judge in Chambers for his approval.

Solicitors: *Walter Webb & Co.; H. C. Godfray; Watson, Sons, & Room.*

W. L. C.

NORTH, J.
1894
April 24.

In re FRAPE.
Ex parte PERRETT (No. 2).

[1892 F. 1147.]

Solicitor—Costs—Taxation—Right of Client to Dispute Retainer.

A solicitor having delivered ten bills of costs to a client, the client obtained an order to tax the ten bills, the order containing no reservation of a right to dispute the solicitor's retainer:—

Held, that it was not open to the client to dispute the retainer of the solicitor as to one of the bills *in toto*, though he could dispute the retainer as to particular items in any of the bills.

SUMMONS by a client to review the taxation of some bills of costs.

H. D. Frape, a solicitor, had been employed by *Frederick Perrett* to transact various matters of business for him, including negotiations for the sale, and the sale of a house called *Amport House*, which was ultimately sold to a Mr. *Knight*. The purchase-money was received by *Frape*, and out of it he paid off some mortgages, and made other payments on behalf of *Perrett*, and on handing over the balance to him he retained £80 for "agreed costs." On the 23rd of February, 1892, *Perrett* signed at the foot of the account handed to him by *Frape* a receipt for the balance which was then paid to him.

On the 5th of May, 1892, *Perrett* obtained from a Master of the Queen's Bench Division an order that *Frape* should, within fourteen days, deliver to him "a bill of costs in all causes and matters wherein he has been concerned for" *Perrett*.

In obedience to this order *Frape* delivered to *Perrett* ten bills of costs.

Bill No. 1 was headed "Lord *Ashbrook's* Matter." The items in this bill, under dates in August, 1888, and February and March, 1891, amounted altogether to £8 4*s*. 2*d*.

Bill No. 2 was headed "Transfer of your Mortgage." It consisted of two items, under date April 2, 1889, viz., "Charges under *Solicitors' Remuneration Act* for negotiating loan and settling matter, £8 15*s*.; paid stamp, 1*s*.: total, £8 16*s*."

Bill No. 3 was headed "*Lorie's* Mortgage." It included a number of items, under dates September, 1890, September, 1891, and January and February, 1892, amounting in the whole to £16 0*s.* 4*d.*

The other bills related to a proposed lease of the house, which was not carried out, and to negotiations for the sale of the house and its ultimate sale.

The ten bills amounted altogether to £140 7*s.* 8*d.*

Perrett issued a summons in the Chancery Division for the taxation of these ten bills. In an affidavit, which he made in support of the summons, he said that "As to the sum of £8 16*s.* charged in respect of an alleged transfer of mortgage, previous to the delivery of the bill I never received any intimation from *Frape* that he had any charges whatever against me in respect of the alleged transfer."

On the hearing of the summons *Frape* relied on the receipt signed by *Perrett* on the 23rd of February, 1892, as an agreement within sect. 8 of the *Solicitors' Remuneration Act*, 1881, to pay the sum of £80 for costs. Mr. Justice *North* held (1) that the alleged agreement was too vague in its terms, and that it was not binding under sect. 8, and he made the common order to tax the bills, directing "that it be referred to the Taxing Master to tax and settle the bills of fees, charges, and disbursements, ten in number, and in the aggregate amounting to the sum of £140 7*s.* 8*d.*, delivered" by *Frape* to *Perrett.*

Frape appealed. The Court of Appeal held that there was a good agreement within sect. 8, but that it must be referred to the Taxing Master to inquire and certify whether the agreement was fair and reasonable, and that for this purpose he must tax the bills. The order of Mr. Justice *North* was accordingly varied, the order as varied being, "that notwithstanding the agreement, it be referred to the Taxing Master to tax and settle the bills of fees, &c., ten in number, and in the aggregate amounting to the sum of £140 7*s.* 8*d.*, delivered" by *Frape* to *Perrett.* And it was ordered that "the Master do certify whether the said agreement is a fair and reasonable agreement." The Court reserved the costs of the appeal, of the adjournment of the application into

(1) [1893] 2 Ch. 284.

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1894
In re FRAPE
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Court, and of the taxation to be dealt with by the Judge after the taxation and certificate. *Vide In re Frape* (1). The order did not reserve to *Perrett* the right to dispute the retainer of the solicitor as to any of the bills *in toto*. Upon the taxation *Perrett* disputed the retainer of *Frape* as to Bill No. 2 *in toto*. The Taxing Master held that *Perrett* was not entitled to do this, and he allowed the whole of the £8 16*s*. charged in Bill No. 2. He taxed the amount of the ten bills at £65 19*s*. 10*d*., and certified that "the agreement was in my judgment a fair and reasonable agreement." *Perrett* carried in objections to the taxation, one of the objections being to the allowance of the two items in Bill No. 2, "on the ground that the work was done without his authority and without consulting him in any way, so that the said *F. Perrett* is not liable for any part thereof. It is submitted that it is not the law, as suggested by Mr. *Frape*, that the said *F. Perrett* is precluded from questioning the retainer (see *In re Herbert* (2); *In re Jones* (3)." In answer to this objection the Taxing Master said: "I doubt whether the question of retainer is really before me. Undoubtedly the question was before the Court, and evidence was adduced on both sides upon it. If the Court had intended to leave the question of retainer to the Taxing Master, should not the order have reserved the Petitioner's right to challenge the retainer? Such is, I think, the usual practice. See orders in *Re Jowett* and *Re Hanbury*, which have quite recently come before me. In these circumstances was it not the intention of the Court that the Master should tax this bill (being one of the ten bills referred to be taxed), but not disallow it altogether on the ground of non-retainer? According to fact, I am of opinion that the Petitioner did not authorize the transfer of the mortgage in respect of which the £8 16*s*. was incurred. I do not think he knew anything about it. At the same time I am of opinion that the transfer of the mortgage avoided very considerable expense to the Petitioner (it saved a reconveyance and another mortgage), and was, in my judgment, a prudent transaction on the part of the solicitor, and highly beneficial to the Petitioner. To my mind it is abundantly clear that, had the solicitor mentioned the matter to the Petitioner,

(1) [1893] 2 Ch. 284. (2) 34 Ch. D. 504. (3) 36 Ch. D. 105.

he would undoubtedly have authorized the solicitor to carry out the transfer, and the fact is established that the Petitioner derived advantage therefrom. For the reasons above stated I have not disallowed the bill. On the contrary (and notwithstanding that the Petitioner knew nothing about the transfer), I have allowed it in its entirety, the said bill being as a bill a strictly proper bill."

T. L. Wilkinson, for the client:—

The Taxing Master was wrong in holding that the client could not dispute the retainer of the solicitor as to the whole of Bill No. 2. No doubt, if there had been only one bill, the client could not, under the common order to tax that bill, dispute the retainer of the solicitor *in toto*; he could dispute the retainer only as to particular items, or classes of items, comprised in the bill: *In re Herbert* (1); *In re Jones* (2); *In re Bracey* (3). But these ten bills delivered together form in substance only one bill. Most of them, if not all, relate to the same transaction—the sale of the house and the negotiations which led up to that sale. The solicitor ought to have delivered one bill, and it cannot make any difference that he has not fastened all the sheets together so as to form one bill. If there had been in form only one bill (and in substance there is only one) the client could have disputed the retainer as regards the items which are comprised in Bill No. 2, and he cannot be deprived of this right merely because the solicitor has chosen to deliver ten bills in place of one. The evidence shews that the retainer as regards the business to which Bill No. 2 relates was in dispute from the beginning. The bills are referred in the order as "ten in number" only for the purpose of identifying them. The agreement to pay £80 in settlement of costs could not apply to the costs of business of which the client had no knowledge.

Peile, for the solicitor:—

The question of retainer was raised too late. The ten bills have been treated as separate and distinct bills, and the client

(1) 34 Ch. D. 504. (2) 36 Ch. D. 105. (3) 8 Beav. 266.

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cannot now be heard to say that they form only one bill. If the client desired to dispute the retainer as to one bill *in toto* he ought to have had inserted in the order a reservation of his right to do this. This, as the Taxing Master says, would have been in accordance with the practice. In the cases cited there was only one bill. In the present case the client has been benefited by the transfer of the mortgage; it was by mere accident that the solicitor did not inform him of the mode in which the transaction would be carried out.

T. L. Wilkinson, in reply.

NORTH, J.:—

In my opinion the Taxing Master was right. The client had employed the solicitor to transact business for him for several years. He obtained from the Queen's Bench Division an order that the solicitor should deliver to him a bill of costs in all matters in which the solicitor had been concerned for him. The solicitor then delivered to the client ten separate bills of costs. The fact that the client had asked for the delivery of "a bill" could not prevent the solicitor from delivering ten bills, if in the absence of the order it would have been proper for him to do so. It is not disputed that the Bill No. 2 related to a distinct and separate matter, but it is said that seven, at any rate, of the bills related to the sale of the house, and ought to have been included in one bill. If that be so, it does not follow that the other three bills were not properly delivered as separate bills. Bill No. 2 relates to a separate, independent, and isolated transaction. The client accepted the ten bills, and he applied for and obtained an order to tax and settle "the bills, ten in number," delivered to him. He treated them as ten separate and independent bills. If each of the ten bills had stood alone he could not have applied for an order to tax the bill without admitting the retainer of the solicitor to some extent. In the same way it seems to me that the client, by obtaining an order to tax ten bills, has admitted the retainer of the solicitor to some extent as to each of those bills—not necessarily as to all the items in each of them—but there is an

admission that as to some of the items included in each of the ten bills the client is indebted to the solicitor for costs. When the matter originally came before me it was said that the client had agreed to pay the solicitor £80 in settlement of his costs, and that was really the only question then raised. As to several of the points which I decided the Court of Appeal agreed with me, but they differed from me as to one point. I thought that the alleged agreement did not shew to what costs it applied, and that it was not a sufficient agreement within sect. 8 of the *Solicitors' Remuneration Act*, and that the client was entitled to the common order to tax the ten bills. The Court of Appeal held that the words "agreed costs" interpreted themselves, and that the agreement must cover all costs incurred down to its date. Then the question arose whether, there being an agreement within the Act, it was a fair and reasonable agreement, and the Court held that it must be referred to the Taxing Master to certify whether the agreement was fair and reasonable, and that for that purpose he must tax the bills, in order that he might know the amount of the costs which were settled by the agreement. The order of the Court of Appeal did not in substance differ from that which I had made, except that they altered it by reserving all the costs to be dealt with after the taxation. As regards this Bill No. 2 the Taxing Master has found that the work to which it relates was actually done by the solicitor, and that the charges were proper in amount, but that the client did not know anything about the work having been done until the bill was delivered, though he had had the benefit of the work. The question is, whether under these circumstances it is open to the client to dispute the retainer of the solicitor as regards Bill No. 2? In my opinion it is not. It cannot, I think, be said that this bill forms part of a whole as regards part of which the retainer is admitted. The bill relates to a separate, independent, isolated transaction. It was necessary to tax it in order to ascertain whether the agreement was fair and reasonable. The right of the client to dispute the solicitor's retainer as to this bill *in toto* was not reserved in the order as it ought to have been, if he was to have that right. In my opinion the Taxing Master was right in holding that,

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having regard to the form of the order, which directed him to tax ten bills, he could not go into the question of retainer as regarded the whole of any one of the bills, though he could do so as regarded particular items in any of the bills. Bill No. 2 consists of only two items, and must obviously be disputed entirely or not at all. It must be remembered too that it would be grossly unfair if, in ascertaining whether the agreement was fair and reasonable, this bill should not be taken into account at all.

The summons to review the taxation must be dismissed.

Solicitors: *Atkinson & Dresser; Venn & Woodcock.*

W. L. C.

KEKEWICH, J.

1894

March 1.

In re NEWEN.
NEWEN *v.* BARNES.

[1894 N. 38.]

Settled Estate—Tenant for Life—Female Tenant for Life—Equitable Interest—Letting into Possession—Title Deeds, Custody of—Practice—Originating Summons—Parties—Trustees—Reversioners—Mortgagees—Appointment of new Trustees—Donee of Power appointing himself.

An equitable tenant for life of a settled estate is entitled to be let into possession on a proper case being made; but the order on an application for the purpose must contain terms protecting the trustees, especially where the property is subject, as in the case of leaseholds, to onerous covenants. The application may be made by originating summons, which must be served upon the trustees, and upon the mortgagees, if any, of the interest of the tenant for life, though not, under ordinary circumstances, upon the reversioner. But, where the tenant for life has mortgaged his interest, the order letting him into possession does not carry with it the right to the custody of the title deeds: these the mortgagee can insist on being retained by the trustees.

A female equitable tenant for life is not necessarily disqualified from being let into possession.

In re Peake's Settled Estates (1) considered.

The donee of a power of appointing new trustees cannot appoint himself either solely or jointly with other trustees.

In re Skeats' Settlement (2) followed.

GEORGE NEWEN, by his will dated the 16th of August, 1867, appointed his wife, *Maria Newen*, and *Joseph Duvey* and *Charles Claridge Druce*, his trustees and executors, and devised and bequeathed to them all his leasehold and other property, not being money; as to his leasehold messuages, formerly *Hyde Park Terrace, Kensington Gore*, upon trust to permit his said wife to have and enjoy the same during her life, she paying out of the rents and profits the ground rent and performing the lessee's covenants, and likewise paying certain annuities (all of which lapsed); and from and after the decease of his said wife, upon trust that the said trustees or the survivor, his executors, administrators or assigns, should, with and out of the annual rents

(1) [1893] 3 Ch. 430. (2) 42 Ch. D. 522.

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and profits, pay and discharge the ground rent and any other sums of money payable for, in or about the observance or performance of the covenants on the lessee's part contained in the lease of the premises; and upon further trust from time to time to retain, use and expend any part of the residue of such annual rents and profits for indemnifying the said trustees or trustee against any losses or damages incurred concerning the said premises: and upon further trust to pay a certain annuity, which lapsed: and as to the ultimate surplus of the said rents and profits, upon trust to divide the same into three equal shares, and stand possessed of one such share in trust for his niece *Mary Newen*, of one other such share in trust for his niece *Lydia Newen*, and of the other of such shares in trust for his niece *Eliza Maria Newen;* and upon further trust, as to each of his said three nieces who should attain the age of twenty-one years, and should not previously have been married, to pay unto her one equal third part of such surplus rents and profits for her own absolute use until she should be married. And, after directing that in case of the marriage of any niece her share should be settled on herself and her children, the testator declared that the share of any niece dying without children should go unto or equally amongst the other or others of his said nieces upon the trusts concerning her or their original share or shares. And the testator declared that, if all his said nieces should die without children, then the said leasehold premises should be held in trust for the said *Joseph Davey*, and his sisters *Rachel, Margaret* and *Lydia*, and the survivors, in equal shares as tenants in common during their joint lives, and for the survivor of them absolutely. And as to his two leasehold messuages in *Montague Place, Clapham Road, Surrey*, the testator, after giving a life interest therein to his brother, which lapsed, directed his trustees to hold the same upon trusts similar to those thereinbefore declared of his leaseholds at *Kensington Gore*, save and except that, if all his said nieces should die without leaving any children or child living at their or her respective deaths or death, then the said leasehold premises in *Montague Place* should go to and be held in trust for *Samuel Bowley* absolutely if living, but if he should not be living at the time of the happening of the said event, then to and for

all the children of the said *Samuel Bowley* then living in equal shares. And the testator empowered his trustees or trustee to sell his leasehold and other property, to exercise all the powers given by the Act 23 & 24 Vict. c. 145, and to demise any of his said leasehold premises for any term not exceeding twenty-one years. And he gave the income to arise from his stocks or shares and interest in the *Vale of Neath Railway Company*, then taken by the *Great Western Railway Company*, to his wife for life, and after her decease to his niece *Mary Newen* for life, and after her decease to be held by the said trustees upon the same trusts as were thereinbefore declared with regard to the rents of his said leasehold premises in *Hyde Park Terrace* thereby bequeathed for the benefit of his said niece *Mary Newen* and her children, with like remainders over. And after directing payment of certain legacies, the testator gave and bequeathed his residuary estate to his wife absolutely. And it was provided that in case any or either of them the said trustees, or any succeeding trustee or trustees to be nominated by virtue of the present provision, should die, or desire to be discharged, or refuse or become incapable to act, then and in every such case it should be lawful for the surviving or continuing trustee or trustees, or the executors or administrators of the last surviving trustee, by deed to appoint "any other proper person or persons" to be a trustee or trustees. And the testator directed "that my trustees shall be at liberty to appoint a receiver and manager of the said leasehold property, at a salary or on commission, to receive the rents and defray the outgoings of the said leasehold properties or any of them," and should also have full power to have his estate administered by the Court of Chancery if they should deem it expedient.

The testator died on the 21st of January, 1876, and his will was proved by his widow, *Maria Newen*, and *C. C. Druce* alone, *Joseph Davey* having predeceased the testator.

The widow, *Maria Newen*, survived *C. C. Druce*, and died on the 25th of March, 1887, having made a will appointing an executor, who died in her lifetime; and on the 12th of May, 1888, administration with the will annexed was granted to the testator's two nieces, *Eliza Maria Newen* and *Lydia Newen*, the

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other niece, *Mary Newen*, having predeceased the testator *George Newen;* and by an indenture of the 23rd of June, 1887, *Eliza Maria Newen* and *Lydia Newen* appointed *Eliza Maria Newen, John Bowley* and *Henry Ernest Barnes*, trustees of the will of *George Newen.*

Margaret Davey was the sole survivor of the *Davey* family named in the will, and as such was entitled in reversion to the *Kensington Gore* leaseholds and the *Vale of Neath Railway* stock, now represented by £4700 5 per cent. *Great Western Railway* rent-charge stock, subject only to the interests of *Eliza Maria Newen* and *Lydia Newen* and their children, if any, therein.

Samuel Bowley, named in the will, was dead, and had left children, several of whom were now living.

By an indenture of the 29th of September, 1891, *Eliza Maria Newen* and *Lydia Newen* mortgaged their interests under the will to secure £7000 and interest, which mortgage was now vested in *Earle Laurie Douglas.*

The various leasehold properties were held for the residues of terms created by certain building leases, being subject to ground rents, and they were sublet to tenants on repairing leases.

This was an originating summons taken out by *Eliza Maria Newen* and *Lydia Newen*, the two equitable tenants for life, against *Henry Ernest Barnes* and *John Bowley*, the trustees, together with the first named Plaintiff, of the will of *George Newen*, for an order that—they, the Plaintiffs, respectively undertaking, so long as they might remain in possession or receipt of the rents and profits of the said leasehold premises, to pay the ground rents and perform the covenants in the leases, and to keep the Defendants indemnified against any personal liability in respect of such rents and covenants, and from time to time to supply to them all such information as they might reasonably require with respect to the said premises—they, the Plaintiffs, might be let into, and until further order remain in, possession and receipt of the rents and profits of the said leasehold premises, and of the dividends on the £4700 *Great Western* stock; and for an order that the Defendants should deliver up to them, the Plaintiffs, all muniments of title in their possession relating to the said leasehold premises, including the counterparts of and

agreements for sub-leases or tenancies, and that the Defendants should execute all proper authorities entitling the Plaintiffs to receive the dividends on such stock.

From the evidence, it appeared that the rents of the sub-leases had been collected by the solicitors to the trustees; but that recently there had been some difficulty in collecting the rents, as the Plaintiff *Eliza Maria Newen* herself claimed the right, as one of the trustees, to collect them, and her solicitors had accordingly served notices on the tenants to pay their rents to her.

A summons by the mortgagee for leave to attend the proceedings came on with the above summons.

Warmington, Q.C., and *Vernon R. Smith*, for the Plaintiffs:—

The Plaintiffs, as equitable tenants for life, are entitled to be let into possession of the leaseholds, and to have the custody of the title deeds, and the application may be made by originating summons: *In re Wythes* (1); *In re Bagot's Settlement* (2).

Marcy, for the Defendant *John Bowley*:—

This Defendant is a co-trustee and also a beneficiary: he does not oppose the application.

W. F. Hamilton, for the Defendant *Henry Ernest Barnes*:—

As trustee I do not oppose the application, but I wish to point out that *Eliza Maria Newen* claims the right to collect the rents.

[KEKEWICH, J.:—That seems to me a strong reason for letting the Plaintiffs into possession, if they are willing to collect the rents without commission.]

Then there are leaseholds of which the testator was lessee, subject to certain ground rents. These and also dilapidations the trustees are bound to see are provided for. If the Plaintiffs are let into possession, the order should be made without prejudice to the right of the trustees to resume possession: *Hoskins* v. *Campbell* (3).

(1) [1893] 2 Ch 369. (2) [1894] 1 Ch. 177.
(3) W. N. (1869) 59.

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A. D. Maclaren, for a reversioner, who was not a party to, nor had been formally served with, the proceedings:—

I submit that the present arrangement should continue.

The Plaintiffs, being ladies, are incompetent to manage the property. In *In re Peake's Settled Estates* (1), Mr. Justice *North* declined to give authority to sell settled estates to two ladies. The Plaintiff, *E. M. Newen*, who has been appointed trustee, is herself one of the donees of the power; the appointment is therefore irregular: *In re Skeats' Settlement* (2).

A. F. Peterson, for the mortgagee of the life estates:—

To let the Plaintiffs into possession would seriously imperil my security. At all events, they should not be allowed to have the custody of the title deeds on which my security depends: they should remain in the hands of the trustees or be handed to me. Secondly, the tenants for life should not be let into possession without the consent of the mortgagee: *Settled Land Act*, 1882 (45 & 46 Vict. c. 38), s. 50.

Warmington, in reply:—

I admit *Eliza Maria Newen* could not appoint herself a trustee: that shall be set right.

KEKEWICH, J.:—

There are one or two points of some little interest arising on this summons which must be noticed independently of the merits; but before noticing them I desire to say that, though I propose to make a qualified order according to the summons, that is, granting the application, I must not be understood as laying down any rule that equitable tenants for life are, as a matter of course, and without consideration of all the circumstances, entitled to be let into possession. It would be wrong for me to do so, and I do not think I did so in the case of *In re Wythes* (3); and certainly the later case of *In re Bagot's Settlement* (4), before Mr. Justice *Chitty*, shews that that is not the course of the Court. Still, no doubt those two cases shew that the applications may be

(1) [1893] 3 Ch. 430.
(2) 42 Ch. D. 522.
(3) [1893] 2 Ch. 369.
(4) [1894] 1 Ch. 177.

made nowadays with very much greater chances of success than before; and it is quite likely that after a time we shall be able to lay down some rules respecting the circumstances which do justify such an application, and the safeguards which are necessary for the protection of trustees and others.

Now I pass to the one or two points which are independent of the merits. The first is, whether an application of this kind can properly be made by originating summons. I think the very short and conclusive answer is that it was made in that way in the case of *In re Bagot's Settlement* (1), before Mr. Justice *Chitty*, and he did not take any objection to it; therefore I do not see why I should. Therefore, without referring to any particular order or any particular rule, I pass that by as being reasonably clear.

The next point is this: Who are entitled to be present to assist the Court, or to make their own objections, on such an application? Of course, the applicant is necessarily the tenant for life. It may be that other persons are joined in the application; but the tenant for life must be essentially the applicant, and the application must have been served on the trustees; and the Court looks to them for all the assistance and all the information that the trustees can properly give; and not only for all the information, but for the objections which can be reasonably urged from two points of view — that is to say, from the point of view of their own protection, and from the point of view of justice to other parties interested. As a rule, I think that the trustees ought to be, and are, perfectly competent, through their solicitors and counsel, to take care of themselves and of the estate, and, in the absence of any urgent reason to the contrary, I think the Court ought to be satisfied with having the trustees here. If, as in the case here, one of the trustees happens to be a beneficiary, an accident of frequent occurrence, then, of course, one would prefer that the other trustee should be separately represented, so that he may appear *quâ* trustee only, leaving the trustee who is a beneficiary to appear in the character of beneficiary.

The next thing to consider is, whether persons who are

(1) [1894] 1 Ch. 177.

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interested in the property, but are not affected, ought to be parties; that is not a question which has been raised here, but it was raised in *In re Bagot's Settlement* (1). In that case the plaintiff, the equitable tenant for life, took the property subject to a prior rent-charge in favour of her mother, who was not made a party to the application; and Mr. Justice *Chitty* dealt with the question thus (2): "No order that I am now making will affect her" (the mother's) "position in any way." According to the ordinary rules, a person in that position need not be served and need not appear; he has nothing to do with the case.

But then there are persons, of whom I have an instance here, who are extremely interested in the application, and in the mode of dealing with it, and those are persons who are to come into possession when the estate for life is determined; in other words, the remaindermen or the reversioners. Of course they must be very much interested, and particularly so in a case like leaseholds, where there may be dilapidations, or where there are covenants to observe, the non-performance of which may involve a liability on the estate. That observation is not confined to leaseholds, because you may have covenants with regard to freeholds, and you may have property respecting which management —such as restricting waste or enabling improvement—is of the very greatest importance, and the remainderman or reversioner may have a great deal to say on the application for the surrender of possession by the trustees to the tenant for life. I think, therefore, that although the tenant for life ought not to make the reversioner, under ordinary circumstances, a respondent to such a summons as this, and certainly need not do so, if the reversioner knows of the application and thinks it worth while to appear, he is entitled to do so, and, speaking for myself, I am glad to hear counsel in any case where they can give me information; and the reversioner has given me assistance in this particular instance.

Then as regards the one remaining class. Suppose the tenant for life has mortgaged his interest, ought the mortgagee to be before the Court? There, I think, I ought to go a step further and say, not only that the mortgagee may be a party, but that

(1) [1894] 1 Ch. 177. (2) [1894] 1 Ch. 183.

he ought to be a party. There the tenant for life is apparently —though perhaps not in substance—derogating from his own grant; that is to say, he is seeking that possession which was not his at the time of the mortgage, but was in the trustees. He is seeking to take away, and certainly to alter, the position of the mortgagee. I think, therefore, that it would be the duty of the trustees in all such cases, if the mortgagee is not before the Court, to take care that the Court is informed that there is such a mortgage, which, of course, the trustees would know, and at any rate to give the mortgagee an opportunity of appearing if the tenant for life has not given it by service. That disposes, I think, of the preliminary points, which perhaps are more important in this case than anything else.

These ladies are tenants for life of leaseholds. There are certain powers vested in the trustees: there is a power of sale, and, of course, there are powers of management; and the powers of management are extremely valuable as regards leaseholds, for the reasons I have already indicated. Ought that to prevent the Court from giving the tenant for life possession, the actual legal power of dealing with the estate. I do not myself see any reason in that. The will provides, amongst other things, that the trustees may "appoint a receiver and manager of the said leasehold property, at a salary or on commission, to receive the rents." That seems to have been done in this case. To my mind, the very existence of such a power, or rather the exercise of it, points to the advantage of making such an order as I am asked to make. The tenant for life not unreasonably says, "If the trustees cannot receive the rents themselves with their own hands, which in very few cases they can, and they want to appoint a receiver and manager at the expense of the estate, let us do it; perhaps not with our own hands, but by our own receiver and manager; and if we do not stop expense, which we probably shall, at any rate we shall have the advantage of paying our own servant, instead of having somebody else, and probably a solicitor into the bargain, which we can dispense with." That seems to me to be reasonable and right. I see no other reasons, as regards the trustees, why these ladies should not be let into possession. The trustees must be protected. They have

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a personal liability. As regards that personal liability, of course they have the whole trust estate; they are owners of the leaseholds, and it is not a question of the estates for life, but of the absolute interest—that is to say, the whole lease. As regards that, they have a right of indemnity against the whole trust estate. But they have also rights, as regards these life estates, which depend on their obligations to the remainderman. They hold the life estate on a trust to preserve the subject of it for the remainderman; and if they neglect their duty they may make themselves liable to the remainderman for allowing dilapidations or anything of that kind. I think the trustees ought to be fully protected against all liability—that is, they ought to be not only protected against all pecuniary liability, but they ought to have such undertakings as will enable them to satisfy themselves from time to time that the trust estate is being preserved, and that that is being done which ought to be done. So much for the trustees, who, of course, must have their costs paid by the tenants for life, who are making the application. It is for the Applicants' convenience, and for nobody else's.

Now as regards the reversioner and mortgagee. They are in one point, it seems to me, in common, and it is this: We take a trust estate. We are entitled to say we prefer the intervention of the trustees; that is how the estate was constituted originally, and we prefer that we should have the intervention of the trustees, and that there should be no departure from the original arrangement. That point seems to me to be common to both parties. But, on the other hand, the mortgagee can, I think, urge it with very much greater force than the reversioner.

The reversioner only claims through the testator's bounty, and if, according to the law and practice of the Court, the tenants for life are, with proper reservations, entitled to possession, the reversioner's position is not really altered. He has an equitable estate in reversion, subject to an equitable estate in possession, with such alterations as the law and the practice of the Court permit. That is all the testator must be taken to have intended to give him. Of course, I know perfectly well that I am interfering with the testator's expressed intention, as was the case in the instance before Sir *George Jessel*, cited by Mr. Justice *Chitty*

in the course of the argument in *In re Bagot's Settlement* (1). But that is so because the law and practice of the Court vary from time to time, and because they do not always agree with the expressed intentions of testators. A reversioner claiming under a testator's bounty cannot be in any better position as to that than a tenant for life who claims under the same bounty. The mortgagee, I repeat, can urge that point rather more strongly, because the mortgagee has entered into a contract with the equitable tenant for life out of possession, and may fairly say—at any rate, may say with some force, "Our bargain was that you should be equitable tenant for life, receiving your income through the trustees, having your property managed by the trustees, and that I should be able to look to them." There is a great deal of force in that. Still, I do not think it is possible for a mortgagee to say, "I forgot that possession was sometimes given to tenants for life; that such an application could be made; that the law and practice of the Court might possibly result in that; and because I omitted to give all those matters my full consideration, therefore you ought not to have the possession which I never thought you would, and which you never hoped or intended to have." It is a stronger case than that of the reversioner, but still one, I think, which fails.

Then the mortgagee has a point of his own on which I think he is entitled to succeed. He says that, in addition to possession, the tenants for life ask for the title-deeds. The trustees are the proper custodians of the title-deeds; the tenant for life is not. The mortgagee is entitled to say, "If the tenant for life has the title-deeds, I must have them. The tenant for life cannot hold the title-deeds against me, her mortgagee, and I am entitled to that extent to stand in her shoes." There is a great deal to be said in favour of that view. At any rate, I think that is sufficient to prevent the handing over of title-deeds by the trustees to the tenants for life for all purposes.

If the tenant for life wishes to exercise powers which require the temporary custody of the title-deeds, or even the passing over of them to purchasers, then other questions will arise, and I do not for a moment wish to preclude the tenant for life from

(1) [1894] 1 Ch. 177.

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insisting on her rights, whatever they may be, under such circumstances. All I say is that possession in this case cannot carry the custody of the title-deeds. I think I have now dealt with all the points argued.

With regard to the authorities, I have already referred to *In re Bagot's Settlement* (1), before Mr. Justice *Chitty*.

But there is a case of *In re Peake's Settled Estates* (2), before Mr. Justice *North*, in which he declined to confer upon ladies who were the trustees of a will authority, under the *Settled Estates Act*, 1877, to sell the estates settled by the will. There is no doubt a discretion in the Court; and, in the exercise of that discretion by declining to do what was asked, the learned Judge thought there ought to be other trustees; but I cannot think he meant that he never would listen to a lady's application of that kind. What he must be taken to have meant was that in that particular case he thought that the powers asked could not be conveniently given to the two ladies who happened to be the applicants in that particular case. In the present case a different point occurred. It seems that all the trustees appointed by the will are dead; and the last surviving trustee appointed an executor, who died in her lifetime. Then these two ladies were entitled to administer the estate, and they did so; they obtained letters of administration with the will annexed, the result being that, either under the Act or under the will, they had power to appoint new trustees. That power goes to the surviving or continuing trustee or trustees for the time being, or the executors or administrators of the last surviving trustee, which these ladies were. They are, according to the power, to appoint "any other proper person or persons" to be a trustee or trustees. They appointed one of themselves, a lady, and the two others were gentlemen. That, to my mind, was entirely wrong. The case really comes within the decision of Mr. Justice *Kay* in *In re Skeats' Settlement* (3); but, quite apart from that, I have not myself the slightest doubt that it is wrong in principle. Mr. *Warmington* gave it up on the ground, amongst others, but sufficiently on the ground, that the power was to appoint "any other proper person or persons,"

(1) [1894] 1 Ch. 177. (2) [1893] 3 Ch. 430.
(3) 42 Ch. D. 522.

and that you cannot yourself be another person than yourself; that is no doubt sufficient. But I desire to say that, as far as I am concerned, I conceive the law to be that, without any such words as that, no trustee having a fiduciary power of appointing trustees can exercise that power by appointing himself, either alone or together with any other person. I think the proper thing is that she should retire by a proper deed, which can be indorsed on the appointment of 1887; this will not only effect her retirement, but the devolution of the trust estate on the other two trustees. I have not heard a word of objection to those two trustees. They do not act together on the present occasion, because one of them is beneficially interested; but I have not heard a suggestion that they are not proper trustees, or that they will not do all that is right.

Therefore I now propose to make an order for letting the two lady Plaintiffs into possession; but it must not be drawn up until the retirement of the lady who is a trustee is perfected, and until the proper protecting undertakings are also settled. I shall adjourn the summons back to Chambers for that purpose, and the order will be made then.

Now as regards the costs. The ladies must, of course, pay the costs of the trustees whom they displace, including Mr. *Bowley*, who appeared by Mr. *Marcy*. As regards the reversioner, he has come here to protect himself. If he thought it worth while to come, he must think it worth while to pay for coming. I cannot give him any costs.

As regards the mortgagee, I think that he is a proper party here, and he is therefore entitled to the usual order, that he be at liberty to add his costs to his security. If it appears that that is insufficient, I must order him to be paid by the Applicants; but I shall not do so unless I am satisfied that his security is insufficient.

Solicitors: *King, Wigg & Co.; A. G. Ellis; Troutbeck & Co.; Harold Smith & Gorringe; W. F. Saunt.*

G. I. F. C.

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March 20; *April* 4.

In re WOOD.
TULLETT *v.* COLVILLE.

[1893 W. 2282.]

Will—Devise—Gravel-pits—Trust to work out and then sell—Proceeds of Sale —Gift to unascertained Class—Remoteness—Perpetuity.

A testator directed his trustees to carry on his business of a gravel contractor until his freehold gravel-pits were worked out, and then to sell them; and he directed his trustees to hold the proceeds of sale in trust for such children of his "then living," and such issue living of any children then deceased, as should, being sons, attain twenty-one, or, being daughters, attain that age or marry, in equal shares per stirpes: and it was his wish that, until such sale, his sons should continue to be employed in the business.

The testator left several children. At his death the greater part of his gravel-pits had been worked out, and the remainder was worked out by his trustees in six years from his death:—

Held, that both the direction to sell and the trusts of the proceeds were void for remoteness.

In re Daveron (1) and *Goodier* v. *Edmunds* (2) considered.

WILLIAM WOOD of *Weston Hill, Surrey*, gravel contractor, by his will, dated the 29th of February, 1872, after bequeathing to *William Tullett* and his, the testator's, son, *George Wood*, his household furniture upon trust for his wife, *Catherine Wood*, during her widowhood, and after making a pecuniary bequest, proceeded as follows:—

"I devise and bequeath all my real estate and all the residue of my personal estate unto and to the use of the said *William Tullett* and *George Wood*, their heirs, executors and administrators, upon trust to dispose thereof according to the direction hereinafter contained concerning the same, that is to say, I direct my trustees to carry on my said business of a gravel contractor until my gravel-pits are worked out, and then to sell the said gravel-pits and the freehold land on which the same are situate, and the horses, carts and other stock-in-trade employed in the same, by public auction, either together or in lots, and subject to such conditions and generally in such manner

(1) [1893] 3 Ch. 421. (2) [1893] 3 Ch. 455.

as my trustees may think expedient, with full power for my sons, or any of them, to bid at such sale. And I direct my trustees to hold the proceeds of such sale in trust for such child or children of mine then living, and such issue living of any child or children then deceased, as shall, being a son or sons, attain the age of twenty-one years, or, being a daughter or daughters, attain that age or marry, in equal shares, but so that the issue of my deceased children may take the share or the respective shares only that the parent or respective parents would have taken if living. And it is my wish and intention that, until such sale as aforesaid, my sons, or such of them as may be willing to do so, shall continue to be employed in the said business as heretofore at the usual wages." And after various specific devises and bequests the testator directed his trustees to hold the ultimate residue of his real and personal estate upon trust for sale, and to hold the proceeds upon trusts for his children and their issue. And he appointed his said trustees executors of his will.

The testator died on the 24th of March, 1872, and his executors proved his will on the 18th of April, 1872. He had twelve children, all of whom survived him but one, a daughter, Mrs. *Colville*, who died prior to the date of the will, leaving issue who were still living.

The gravel-pits referred to in the will were about six acres in extent. At the date of the testator's death he had worked out the whole except about half an acre; and after his death his trustees carried on his business of a gravel contractor, and continued the working of the pits. It appeared from the evidence that with the ordinary staff of workmen employed by the testator, and working the usual number of hours per day, the remaining half acre would have taken from three to four years from the testator's death to work out; but the trustees kept on a smaller staff, and the half acre was not worked out until May, 1878. The whole of the gravel-pits thus having become exhausted, the trustees at once sold the horses, carts and stock-in-trade, and, as opportunity offered, they sold portions of the pits and freehold land. The question having arisen as to whether the children of the testator's daughter, Mrs. *Colville*, who died before the date

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of the will, were entitled to share in the proceeds of sale with the eleven children who survived the testator, this summons was taken out to have that question decided.

Upon that summons the question arose whether the direction for the sale of the gravel-pits, and the trusts of the proceeds of sale, were or were not altogether void for remoteness.

C. E. E. Jenkins, for the Plaintiffs, the trustees and executors of the will, one of whom was a son of the testator:—

I submit that the will creates no perpetuity; it is simply a settlement of the property in a certain way. *In re Dawson* (1) may be cited against me; but that only dealt with a case of child-bearing. If the gift is bad as a perpetuity, it apparently falls into the residue: *Jee* v. *Audley* (2).

Rowden, for the Defendant, *William Edward Colville*, one of the children of Mrs. *Colville*:—

This gift does not offend the rule against perpetuities.

There are sufficient indications in this will that the gift is to take effect within lives in being; for instance, power is given to the sons to bid; and until sale the sons are to be employed in the business. The testator's idea evidently is that the whole of the gravel-pits will be worked out within the required period. "Issue" should be restricted to "children": *Sibley* v. *Perry* (3); so that there is a good gift to a class of ascertainable persons; for no one can take except this class living at the time the pits are worked out. The class to take are the testator's own children and grandchildren, and, the vesting not being postponed beyond twenty-one or marriage, the gift becomes a simple gift to a class, and is therefore good: *Jarman* on Wills (4). The evidence shews that the pits could have been worked in three or four years from the testator's death; and, therefore, the direction to sell cannot be treated as extending beyond the legal limit: *Wood* v. *Drew* (5). But even assuming that the direction to sell may itself extend beyond the limits, yet if the beneficial interest in the proceeds of sale does not involve a

(1) 39 Ch. D. 155.
(2) 1 Cox, 324.
(3) 7 Ves. 522.
(4) 5th Ed. p. 239.
(5) 33 Beav. 610.

breach of the rule, the Court will give effect to the gift: *Oddie* v. *Brown* (1); *In re Daveron* (2); *Goodier* v. *Edmunds* (3).

A further question arises, as to whether I am entitled to share in the residuary gift. It seems clear that, according to the rule in *Christopherson* v. *Naylor* (4) and *Loring* v. *Thomas* (5), a child of a child of a testator dead at the date of the will is entitled to take.

Warrington, for the Defendant, *Richard Wood*, a son of the testator, and representing all the testator's children living at the date of the will:—

Upon the question of remoteness, I take the same view. I cannot contend that, because the Defendant, *W. E. Colville*, is the child of a child who was dead at the date of the will, he is therefore excluded: *Tytherleigh* v. *Harbin* (6).

Benn, for the Defendant, *Thomas Wood*, a grandson of the testator, and representing all the grandchildren other than *W. E. Colville*:—

This gift is altogether void for remoteness, for the class indicated includes unborn persons not necessarily ascertainable within lives in being and twenty-one years afterwards: *Jee* v. *Audley* (7); *Lord Dungannon* v. *Smith* (8).

There must be absolute certainty that the gift will vest within the period; mere probability, in however high a degree, is not sufficient: *Blight* v. *Hartnoll* (9); *In re Dawson* (10). Here, the evidence points to nothing more than a probability that the pits would be worked out within the proper time from the testator's death. It is impossible to ascertain the members of the class to take under this gift, for the testator says it is to consist of children and issue "then living," that is at the time the pits are worked out.

Looking at the state of things at the date of the testator's death, it is quite possible that when the time arrives at which the pits are worked out, a member of the class may be an infant or

(1) 4 De G. & J. 179.
(2) [1893] 3 Ch. 421.
(3) Ibid. 455.
(4) 1 Mer. 320.
(5) 1 Dr. & Sm. 497.
(6) 6 Sim. 329.
(7) 1 Cox, 324.
(8) 12 Cl. & F. 546.
(9) 19 Ch. D. 294.
(10) 39 Ch. D. 155.

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lunatic, and therefore unable to put an end to the trust. A present right to an interest which may arise at a period beyond the legal limit is void, notwithstanding that the person entitled to it may release it: *London and South-Western Railway Company* v. *Gomm* (1).

Accordingly the gift is void, and falls into the residue.

Rowden, in reply:—

In order to make a gift of this kind valid, it is not necessary that the exact shares to be taken by the persons indicated should be defined, except in cases of accumulation: *Curtis* v. *Lukin* (2). It is sufficient if the maximum of the class to take can be ascertained.

KEKEWICH, J.:—

It is with extreme reluctance that I have so to construe this or any other will as to defeat what is presumably the intention of the testator; but such reluctance must be overcome in favour of a fair construction of the language used by the testator, having regard to the settled rules of the Court.

The testator in this case was a gravel contractor, and it appears that he had gone a long way towards working out certain gravel-pits belonging to him; but at his death some portion of them still remained to be worked out. The date of his will was the 29th of February, 1872, and it was proved in April of the same year; so that he did not live long after the date of his will, and it appears from the evidence that, at the time of his death, there was so little gravel remaining to be worked out, that some few years would have been sufficient to work them out entirely, at the same rate of working, within the limit of remoteness. And it also appears that he contemplated it as possible that the gravel would be worked out while his sons would be able to take a large part in his business, because he says that, until the sale of the gravel-pits, "my sons, or such of them as may be willing to do so, shall continue to be employed in the said business as heretofore at the usual wages." But he does, in the most general terms, direct his trustees "to carry on my said business

(1) 20 Ch. D. 562, 573. (2) 5 Beav. 147.

of a gravel contractor until my gravel-pits are worked out, and then to sell the said gravel-pits." Standing alone, that direction appears to me to offend against the rule of perpetuities in two respects; that is to say, the direction to carry on the business for an indefinite time is bad, and the direction to sell after the gravel-pits are worked out is bad. I do not see any possible answer to that, unless evidence is admissible and is sufficient to prove that the gravel-pits would be worked out within the prescribed time. If there were evidence going as far as this—namely, that it was physically necessary that they should be worked out within the prescribed period, it would be a different case: but the evidence before me only shews that men working out the pits in the ordinary way would work it out in a short time. There is nothing to prevent the trustees declining to work the pits for a very long time, in the hope and intention, for instance, of making a larger market hereafter. And it might be that the pits might fall in, and for that reason might not be able to be worked out for a very long time. In my opinion, this direction must be construed as it stands and transgresses the limit allowed by law.

But then the testator goes on to dispose of the proceeds of sale, and I have two recent authorities on the point which shew that I may regard the persons entitled to the proceeds of sale, when the property is sold, as beneficiaries of the property itself, notwithstanding that the direction or trust for sale is itself invalid. These are cases decided in 1893 before Mr. Justice *Chitty* and Mr. Justice *Stirling*. In the one case, *In re Daveron* (1), there was a direction to sell upon the expiration of a lease, and in the other, *Goodier* v. *Edmunds* (2), a direction to sell after the death of the longest liver of the testator's daughter, his son, and any widow of his son. Mr. Justice *Stirling* saw his way to holding that, although the trust for sale was bad, yet the trust for the beneficiaries was good, inasmuch as there was a direction to pay the rents and profits until sale to the persons to whom the whole of the proceeds of sale were given. If I could so hold here, it would be my duty, and it would be my pleasure, to do it without hesitation. But can I find, as those Judges did,

(1) [1893] 3 Ch. 421. (2) [1893] 3 Ch. 455.

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that these persons were, or are, at any time entitled to the proceeds of sale? Supposing this property were sold to a railway company, or under an order of the Court, could I say that such and such persons are entitled, or can I tell exactly who are entitled, to this money? Two cases were cited to which that principle was applied, as limiting the rule against perpetuities, entitling a testator to escape it on the ground that the persons were ascertainable. One is *Wood* v. *Drew* (1), to which I only refer because Mr. *Rowden* relied on it; but it seems to me that the Master of the Rolls based his reasoning upon this—that the persons to take were all ascertained. When once this can be done, the persons to take may be regarded, for the shares are vested; you know who the persons are. It matters little—I have not to deal with that—what shares they take. If you know who must take the property, then you care less whether the time for selling has arrived.

I now turn to the other case, *Oddie* v. *Brown* (2), because I have there a statement by a careful and learned Judge, Lord Justice *Turner*. In that case there was a direction for accumulation, and Vice-Chancellor *Stuart* held that the bequest was void for remoteness, because the accumulation would extend beyond the period allowed by law. Lord Justice *Turner* deals with the point in this way. After stating (3) that he did not think the dispositions of the will were void for remoteness, he says: "The Vice-Chancellor, as I collect from his judgment, has considered them to be so because the £3000 might not be accumulated within the period allowed by law for the vesting of interests"—that is, precisely in the same way that a sale might not necessarily take place within the period allowed by law for a sale. Then he goes on: "but in arriving at this conclusion he proceeds upon the footing that nothing vests in interest until the £3000 is accumulated."

Lord Justice *Turner* satisfied himself that there was a vesting of interest within the proper limits, and then, finding that, he says it is quite immaterial whether there is or is not any direction as to when the accumulations are to stop, because you have the persons entitled to take these accumulations which are only

(1) 33 Beav. 610. (2) 4 De G. & J. 179. (3) 4 De G. & J. 195.

directed for their benefit, and they can stop what is only for their benefit. Can I find that on this will? Can I adopt that construction here, or the construction in the cases before Mr. Justice *Chitty* and Mr. Justice *Stirling*? I would but for one difficulty. Under this will the testator directs the proceeds of sale to be divided among his children "then living." The only point of time to which that can possibly refer is the time when the gravel-pits are worked out and the power of sale arises. Therefore I must read this trust as a trust "for such children of mine as are living when my gravel-pits are worked out," a point of time which, as I have held, is too remote. The testator also provided for the death of any child in the interim. He says, "and such issue living of any child or children then deceased, as shall, being a son or sons, attain the age of twenty-one years, or, being a daughter or daughters, attain that age or marry." That is to say, these persons to take must be persons—if you can find out who they are—who have attained twenty-one or are married: there is no doubt about that. But these persons must also be living at the same particular point of time, that is to say, when the pits come to be sold, and when the proceeds are to be divided. That is too remote. It is impossible, on the language of this will, to say who now are to take, or at any particular point of time will take. Consider the date of the testator's death: it would take an indefinite time from that date to work out the pits. Which of his sons will be then living, that is, when the pits are worked out? Can anyone say which of his children will be then living, or which of them will be then dead leaving issue then living? No one can answer that question. Therefore, I decide, though with extreme reluctance, that the gift is too remote, because it is impossible to say, at the date of the testator's death, at what point of time the shares would vest in interest in ascertained persons. They could not be ascertained until the happening of the event which is too remote. It might possibly be that no one of the persons indicated would ever take at all.

I hold, therefore, that the gift is too remote.

Solicitors: *Snow, Snow & Fox: Pownall & Co.*

G. I. F. C.

ROMER, J.

1894

March 13, 14.

SIMS *v.* LANDRAY.

[1893 S. 4400.]

Vendor and Purchaser—Memorandum—Purchaser's Name filled in by Auctioneer's Clerk—Statute of Frauds.

At a sale of real estate by public auction, a lot was knocked down to *A.* as the highest bidder, and *A.*, at the request of the auctioneer's clerk, who was acting under the direction of the auctioneer, gave his name and address as the purchaser, and stood by while the clerk filled in his name and address in the memorandum in the usual way, but did not otherwise sign the memorandum:—

Held, that there was a sufficient signature by or on behalf of *A.* within the *Statute of Frauds.*

ON the 8th of August, 1893, the Plaintiff caused to be put up for sale by public auction certain freehold land in two lots subject to certain printed particulars and conditions of sale, and there was indorsed on the back of the particulars the usual printed form of memorandum of sale, with blanks for the purchaser's name, &c. Lot 2 was knocked down to the Defendant, who was unknown to the auctioneer; thereupon the auctioneer's clerk, by the direction of the auctioneer, went to the Defendant and obtained his name and address as the purchaser, and returned to the auctioneer's table. The Defendant came up to the table and stood by while the clerk filled in his name and address into the memorandum in the usual way as follows: "I, *Joseph Gilbert Landray*, of 6, *Cedars Road, Beckenham, Kent*, do hereby acknowledge that at the sale by auction this day I was the highest bidder for and was declared the purchaser (subject to the foregoing conditions of sale) of the property described in the within particulars as lot 2 for the sum of £1850, and that I have paid the sum of £185 by way of deposit and in part payment of the purchase-money," and so on. When the blanks were filled in, the Defendant was asked to sign the memorandum and pay the deposit; but he excused himself, saying he had not his cheque-book with him. He, however, made an appointment to meet the auctioneer later the same afternoon at the office of the vendor's solicitor to sign the contract and pay the deposit; but

he did not keep the appointment, and subsequently he refused to complete the purchase. The Plaintiff then brought this action for specific performance. The Defendant relied on the *Statute of Frauds.*

Haldane, Q.C., and *W. Barnard*, for the Plaintiff:—

The authorities shew that it is not necessary that the party to be charged should subscribe the memorandum. It is sufficient if his signature appears in the body of the memorandum, and has been inserted at his request: *Knight* v. *Crockford* (1); and the auctioneer was his agent to take his bidding as the purchaser and to sign the contract for him: *Emmerson* v. *Heelis* (2). A recital in a will may be a sufficient memorandum within the statute: *In re Hoyle* (3). Here the Defendant stood by while his name and address as the purchaser was with his assent filled in by the auctioneer's clerk. There is therefore a sufficient signature within the *Statute of Frauds.*

Neville, Q.C., and *Stallard*, for the Defendant:—

No doubt the Defendant refused to sign believing he was not bound until he had subscribed the contract. On a sale of real estate, an auctioneer or his clerk has no implied authority to sign on behalf of a purchaser. It is contrary to all practice. He is only the agent of the vendor, and it is the invariable practice to obtain the signature of the purchaser himself or some agent on his behalf. *Emmerson* v. *Heelis* is not in point. It was not a sale of real estate, but of produce; and the practice in such cases is for the auctioneer or his clerk to keep a book and enter in the name of the purchaser of each lot as the sale proceeds. That is not the practice on a sale of real estate.

[ROMER, J., referred to *Fry* on Specific Performance (4).]

The statute means a signature by an authorized agent. The auctioneer's clerk here did not purport to sign as agent for the Defendant, but prepared the memorandum for signature by the Defendant. There was no intention by either party that the clerk should in any way sign as the Defendant's agent.

(1) 1 Esp. 190.
(2) 2 Taunt. 38.
(3) [1893] 1 Ch. 84.
(4) 3rd Ed. §§ 511, 513.

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SIMS v. LANDRAY.

ROMER, J.:—

The only point here is that of the *Statute of Frauds*. It is too late nowadays for the Defendant to raise that point. It is settled beyond the probability of now being successfully disputed, that where there is a sale by public auction, and the property is knocked down by the auctioneer to the highest bidder, the auctioneer is not only the agent of the vendor, but he is also the agent of the purchaser, the highest bidder; and that he is the purchaser's agent clearly to this extent, that he is entitled to sign, in the name and on behalf of the purchaser, a memorandum sufficient to satisfy the provisions of the *Statute of Frauds*, stating the particulars of the contract. That is what the auctioneer or his clerk did in this case. Undoubtedly the Defendant here was the purchaser of the property. That is proved. The only question is whether the memorandum has been signed sufficiently to answer the *Statute of Frauds*. Clearly there is a memorandum within the statute. The document states the name of the purchaser, and what the price was. The only question is, was that signed by the purchaser or his agent? It was not signed by the purchaser, but it was signed by his agent, as has been settled by authority. Nothing turns here on the question that the memorandum was written by the auctioneer's clerk, because that also has been settled. The point is dealt with in *Fry* on Specific Performance (1); and it is clear here that the auctioneer's clerk had authority from this purchaser to make such a memorandum as was made. The Defendant stood by when this memorandum was made by the clerk, and clearly authorized the making of it. Under those circumstances the defence to the action fails, and the Plaintiff is entitled to judgment for specific performance.

An appeal was set down, but in default of appearance by the Appellant was dismissed on the 24th of May, 1894.

Solicitors for Plaintiff: *Trollope & Winckworth*, agents for *Smith & Burrell, Richmond.*

Solicitor for Defendant: *A. Rogers.*

(1) 3rd Ed. §§ 511, 513.

H. L. F.

MINTER *v.* CARR.

ROMER, J.

1894

March 6, 7, 16.

[1893 M. 947.]

Mortgage—Consolidation—Assignment of Equity of Redemption prior to Union of Mortgages.

B. was the owner of *Blackacre* and *Whiteacre.* In February, 1864, he mortgaged *Blackacre* to *S.*, and in July, 1864, he gave a second mortgage on it to *X.*

In 1863, 1865, and 1866 he mortgaged *Whiteacre* to *Z.* and others.

In 1871 and 1873 the first mortgages were transferred to *R.*

In 1884, *B.* mortgaged both properties to *M.*, and in 1885 he mortgaged both properties to *P.* (in each case subject to the prior incumbrances).

In July, 1890, the second mortgage of *X.* on *Blackacre* was transferred to *P.*, who in October, 1890, under the power of sale in such mortgage, sold *Blackacre* to *M.*, subject only to the mortgage to *S.* :—

Held, that, as the union of the first mortgages had not taken place until after the equity of redemption in *Blackacre* had been assigned to *X.*, the executors of *R.* could not consolidate the first mortgages so to prevent *M.* from redeeming *Blackacre* alone; and that such right of redemption was not affected by *M.* or *P.* being a puisne incumbrancer on both properties when the interest of *X.* vested in either of them.

JAMES BANKS was the owner of two leasehold houses, known respectively as No. 1 and No. 2, *Shakespeare Terrace, Folkestone* (below collectively designated as "property A").

He was also the owner of other leasehold properties (below collectively designated as "property B").

By two separate indentures, dated respectively the 4th of February, 1864, *James Banks* mortgaged the two houses called property A, to *Charles Sedgwick*, to secure two sums of £500 each and interest.

On the 12th of July, 1864, *James Banks* executed a second mortgage of property A, and of certain properties (below called C), other than those mortgaged to *John Banks* and others (as mentioned below), to *Walter Stunt.*

During the years 1863, 1865, and 1866, *James Banks* executed mortgages of the several properties constituting property B, to *John Banks* and other mortgagees.

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In the years 1871 and 1873, *Sedgwick's* (first) mortgages on property A, and the mortgages on property B, were transferred to *R. T. Brockman.*

R. T. Brockman died in 1877, and the Defendants in the action mentioned below were his surviving executors.

On the 3rd of October, 1884, *James Banks* mortgaged properties A and B to *John Minter*, subject to the prior mortgages affecting the same, and on the 27th of March, 1885, *James Banks* executed another mortgage of the same properties to *James Pledge.*

On the 14th of July, 1890, *Stunt's* second mortgage on property A and property C was transferred to *James Pledge.*

On the 8th of October, 1890, *Pledge*, in exercise of the power of sale in the second mortgage transferred to him, conveyed property A to *John Minter*, as purchaser, subject to *Sedgwick's* mortgage, but otherwise free from incumbrances.

On the 30th of March, 1893, *John Minter* brought an action against *Brockman's* surviving executors for the redemption of property A, and the Defendants claimed by their defence the right to consolidate their mortgages on properties A and B.

The action was tried before Mr. Justice *Romer* on the 6th and 7th of March, 1894.

Bramwell Davis, for the Plaintiff:—

The Defendants have no right to consolidate as against the Plaintiff. Where two mortgages are made by the same mortgagor, but on different estates and to different mortgagees, and become united in one person after an assignment has been made (by way of sale or mortgage) of the equity of redemption in one of the properties, the owner of the first mortgages cannot consolidate as against the assignee of the equity of redemption, although both mortgages were created before the assignment: *Harter* v. *Colman* (1). In that case Lord Justice *Fry* refused to follow *Beevor* v. *Luck* (2), which had already been observed upon in *Jennings* v. *Jordan* (3).

[He was stopped.]

(1) 19 Ch. D. 630. (2) Law Rep. 4 Eq. 537.
(3) 6 App. Cas. 698.

Neville, Q.C., and *Edwin Ward*, for the Defendants:—

Where there are first mortgages on a variety of properties, and the equities of redemption are in another person, if the owner of such equities comes to redeem, the mortgagee may consolidate: *Vint* v. *Padget* (1), as explained in *Harter* v. *Colman* (2). On the 3rd of October, 1884, before any transfer of or sale under *Stunt's* mortgage had taken place, but after all the first mortgages on properties A and B had become vested in *Brockman*, *Minter* became a puisne incumbrancer on both properties. Suppose *A.* mortgages *Blackacre* to *C.* and *B.* mortgages *Whiteacre* to *D.*, and then *B.* gives a second mortgage on *Whiteacre* to *E.* Afterwards *C.* takes a transfer of *D.'s* mortgage, thus becoming first mortgagee of both properties, and *A.* acquires the equity of redemption in *Whiteacre*. Admitting, for the sake of argument, that *E.* can redeem *Whiteacre* without redeeming *Blackacre*, because *C.* did not become mortgagee of both till after *E.'s* mortgage, *A.* cannot as against *C.* redeem one without the other. *Minter* stands in the position of *A.*, because he only acquired an equity of redemption behind *Stunt*. Leaving *Stunt* out, *Minter* was in 1884 in the same position as that of *Lee* in *Vint* v. *Padget*, the only distinction between that case and this being that in *Vint* v. *Padget* the equities of redemption were assigned at the same time.

[ROMER, J.:—Some of Lord Justice *Fry's* observations apply to the decision in *Vint* v. *Padget*.]

But he distinguishes it; and, moreover, *Vint* v. *Padget* does not stand alone. Where the owner of two estates equitably mortgaged one to *A.* and the other to *B.*, and then gave a legal mortgage to *C.*, who had constructive notice of the equitable mortgages, and afterwards *B.* took a transfer of *A.'s* mortgage, it was held that *C.* could only redeem *B.* on paying both debts: *Tweedale* v. *Tweedale* (3).

[ROMER, J.:—That seems a most unjust doctrine, and I shall not extend it.]

The fact of *Stunt* having assigned to the owner of the equity

(1) 2 De G. & J. 611. (2) 19 Ch. D. 630.
(3) 23 Beav. 341.

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of redemption in the other properties brings the case exactly within *Vint* v. *Padget* (1).

[ROMER, J.:—When *Pledge* sold to *Minter* the rights which he had obtained from *Stunt*, how were *Minter's* rights as assignee of *Pledge* lessened by the fact of *Minter* being already a puisne mortgagee of *James Banks*?]

Minter cannot be in a better position than *James Banks*. *Harter* v. *Colman* (2) is distinguishable because there the owner of the equity of redemption had not two estates, but only one equity of redemption. Lord *Selborne* said that the "doctrine of consolidation is well established, and cannot now be altered except by the Legislature, whether it originally rested on a sound equitable foundation or not. The present question is as to its proper limits": *Jennings* v. *Jordan* (3).

[*Bramwell Davis* referred to *Coote* on Mortgages (4) and *Higgins* v. *Frankis* (5).

ROMER, J., referred to *Selby* v. *Pomfret* (6).]

Moreover, *Minter's* position is not better than that of *Pledge*, whose rights as transferee of *Stunt's* mortgage are affected by his own position as puisne incumbrancer on both properties. [They also referred to *Flint* v. *Howard* (7); *Squire* v. *Pardoe* (8); *Thorneycroft* v. *Crockett* (9); *Coote* on Mortgages (10); *Bythewood* and *Jarman's* Conveyancing (11).]

Bramwell Davis, in reply:—

Although *Vint* v. *Padget* has not been expressly overruled, the principle of later cases is inconsistent with it. It is inconsistent with *White* v. *Hillacre* (12), which was approved by the House of Lords in *Jennings* v. *Jordan*, while *Beevor* v. *Luck* (13) was overruled. The principle now recognised is that the assignee of an

(1) 2 De G. & J. 611.
(2) 19 Ch. D. 630.
(3) 6 App. Cas. 700.
(4) 5th Ed. p. 910.
(5) 15 L. J. (Ch.) 329.
(6) 3 D. F. & J. 595.
(7) [1893] 2 Ch. 54.
(8) W. N. (1890) 153.
(9) 2 H. L. C. 239.
(10) 5th Ed. p. 906.
(11) 4th Ed. vol. iii. p. 939.
(12) 3 Y. & C. Ex. 597.
(13) Law Rep. 4 Eq. 537.

equity of redemption takes subject to equities existing at the date of his assignment, but is not affected by anything to which he is not a party which subsequently takes place.

If *Stunt's* mortgage had been transferred to a trustee for *Minter*, the latter's right of separate redemption would have been clear. To bring this case within *Vint* v. *Padget* (1), *Stunt's* mortgage should include the whole of the equities of redemption, whereas all the properties were not transferred by it. Unless *Minter* intended to waive his rights, they must remain, and it is clear that he had no intention to give up anything. On the question whether there has been a merger, the Court looks to the intention of the parties: *Adams* v. *Angell* (2).

[ROMER, J.:—It is not put on the ground of merger.]

But that is the effect of the argument. [He also referred to *Baker* v. *Gray* (3); *Tassell* v. *Smith* (4); *Bird* v. *Wenn* (5).]

1894. March 16. ROMER, J.:—

The circumstances of this case, shortly stated, are these:—

One, *James Banks*, mortgages property A (1 and 2, *Shakespeare Terrace*), to *Charles Sedgwick*, and other properties to different mortgagees, the predecessors in title of the Defendants.

After these mortgages are executed, but before they get into the hands of the same mortgagees, the mortgagor mortgages property A (subject to the mortgage to *Sedgwick*), and other properties in which the Defendants are not interested, to one *Stunt*, and this security, on the 14th of July, 1890, is transferred to one *James Pledge*, who, on the 8th of October, 1890, in exercise of his power of sale, sells and conveys property A to the Plaintiff, subject to the mortgage to *Sedgwick*, but otherwise free from incumbrances. In the meantime, after the mortgage to *Stunt* and before the commencement of this action, *Sedgwick's* mortgage on property A, and the mortgages on the other properties to Defendants' predecessors in title mentioned above, became vested in the Defendants. Then this action is brought

(1) 2 De G. & J. 611.
(2) 5 Ch. D 634.
(3) 1 Ch. D. 491.
(4) 2 De G. & J. 713.
(5) 33 Ch. D. 215.

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to redeem property A; and the Defendants claim, as against the Plaintiff, to consolidate with their mortgage on A their securities on the other properties.

This claim, in my opinion, cannot be supported. It was decided by Mr. Justice *Fry* in *Harter* v. *Colman* (1)—and with that decision, if I may say so, I entirely agree—that when two mortgages, made by the same mortgagor to different mortgagees, on different estates, become united for the first time in one person after the mortgagor has assigned (by way either of sale or mortgage) the equity of redemption of one of them, the owner of the two mortgages cannot consolidate them as against the assignee of that equity of redemption, even though both the mortgages were created before the assignment. Applying that to the present case, it is clear that the Defendants could have had no right of consolidation against *Stunt* if he had remained mortgagee of property A. But the Plaintiff has purchased all *Stunt's* rights, and, *primâ facie*, the Defendants have no more right to consolidate against the Plaintiff than they would have had against *Stunt*. In answer to this the Defendants set up what appears to me a wholly untenable and inequitable contention. It appears that, before the 14th of July, 1890, *Pledge* and the Plaintiff were respectively puisne mortgagees of all the properties the first mortgages on which are now united in the Defendants, subject to those mortgages, and subject as to property A also to *Stunt's* mortgage. And it is suggested that in some way or other, when, on the 14th of July, 1890, *Pledge* obtained a transfer of *Stunt's* mortgage, his rights as transferee to resist any claim of consolidation were lost or interfered with because he happened to be also such puisne mortgagee as I have before mentioned. That suggestion I cannot follow. It is clear that there was no merger of *Pledge's* securities, and that he was quite entitled, as transferee of *Stunt's* mortgage, to deal with that security separately, and to sell, as he did, property A to the Plaintiff, subject to *Sedgwick's* mortgage.

It is then suggested that, though this may be so, the Plaintiff, as purchaser of property A, subject only to *Sedgwick's* mortgage, has in some way lost his right to resist consolidation because of

(1) 19 Ch. D. 630.

his other position as puisne mortgagee. That, again, I cannot follow. The Plaintiff's rights as purchaser of property A are not in any way merged with or lost by reason of his rights as puisne mortgagee. He is not coming in this action to assert any rights on his part as puisne mortgagee or to redeem by virtue of his position as such puisne mortgagee. He is coming here simply to redeem *Sedgwick's* mortgage by virtue of his position as purchaser, through *Stunt's* mortgage, of property A, and this he is entitled to do, and not the less because he may have other rights which do not arise to be considered in this action.

For these reasons I hold that the Defendants' claim against the Plaintiff fails, and that the Plaintiff is entitled as owner of property A to the usual judgment for redemption of *Sedgwick's* mortgage. So far as the costs of this action have been increased by the Defendants' claim to consolidate, they must be paid by the Defendants. The other costs will be dealt with in the usual way, treating the action as an ordinary one for redemption of property A, subject only to *Sedgwick's* mortgage, now vested in Defendants.

Solicitors for Plaintiff: *A. R. & H. Steele*, agents for *G. W. Haines, Folkestone.*

Solicitors for Defendants: *Talbot & Tasker.*

F. E.

ROMER, J

1894

March 7, 16

PLEDGE v. CARR.

[1893 P. 821.]

Mortgage—Consolidation—Different Properties mortgaged to Distinct Mortgagees—Assignment of Equities of Redemption to one Person—Subsequent Union of Mortgages in one Person.

B., who was the owner of several properties, in the years 1863–1866, mortgaged them to different mortgagees for distinct sums, and in 1868 gave a second mortgage on all the properties to *H.*

In 1871 and 1873 all the first mortgages except one were transferred to *R.*

In 1885 *H.* transferred the second mortgage to *P.*, and in 1890 the remaining first mortgage was transferred to *R.'s* executors. In 1893 *P.* sought to redeem two of the properties on paying only the amounts due under the first mortgages on them:—

Held, following *Tweedale* v. *Tweedale* (1) and *Vint* v. *Padget* (2), that *R.'s* executors were entitled to consolidate all the first mortgages.

White v. *Hillacre* (3), *Jennings* v. *Jordan* (4), and *Harter* v. *Colman* (5), distinguished.

JAMES BANKS, being the owner of several houses, in the years 1863–1866, executed several different first mortgages of them to several different mortgagees.

Two of these first mortgages, dated respectively the 29th of August, 1863, were mortgages of 5 and 6, *Shakespeare Terrace, Folkestone*, to *John Banks*, to secure two sums of £500 each and interest, and another, dated the 11th of May, 1863, was a mortgage of 34, *Bouverie Square, Folkestone*, to *John Banks*, to secure £450 and interest.

By a mortgage dated the 20th of August, 1868, *James Banks* gave a second mortgage on all the properties to *R. T. Brockman* and *W. G. S. Harrison*, to secure moneys expressed to belong to them on a joint account.

By several indentures made in 1871 and 1873, all but one of the first mortgages were transferred to *R. T. Brockman.*

R. T. Brockman died in 1877, leaving *W. G. S. Harrison* him surviving, and the Defendants in the action mentioned below were *Brockman's* surviving executors.

(1) 23 Beav. 341.
(2) 2 De G. & J. 611.
(3) 3 Y. & C. Ex. 597.
(4) 6 App. Cas. 698.
(5) 19 Ch. D. 630.

On the 1st of April, 1885, *W. G. S. Harrison* transferred the second mortgage of the 20th of August, 1868, to *James Pledge.*

James Banks died in 1889, but his will was never proved, nor were any letters of administration to his estate with the will annexed granted to anyone, and no one representing his estate was a party to the action mentioned below.

On the 27th of December, 1890, the remaining first mortgage was transferred to *R. T. Brockman's* executors, and they held all the first mortgages on the 30th of March, 1893, when *Pledge* brought an action against them to redeem 5 and 6, *Shakespeare Terrace,* and 34, *Bouverie Square,* on payment of the amounts due on the mortgages of the 29th of August, 1863, and the 11th of May, 1863. The Defendants claimed the right to consolidate all the first mortgages.

The action was tried before Mr. Justice *Romer* on the 7th of March, 1894.

Bramwell Davis, for the Plaintiff:—

The Plaintiff is entitled to redeem this one property alone. His predecessors in title could have done so immediately after the execution of the mortgage to them of the 20th of August, 1868, and would not have been prevented from doing so by the subsequent union of the first mortgages in one person. The Plaintiff has exactly the same right as that which his predecessors in title had, and the question is whether the case comes within *Vint* v. *Padget* (1), or *Harter* v. *Colman* (2).

Neville, Q.C., and *Edwin Ward,* for the Defendants:—

The arguments addressed to the Court in *Minter* v. *Carr* (3) need not be repeated. Admitting that all the rights of the Plaintiff's predecessors in title are vested in him, inasmuch as he does not come to redeem till all the first mortgages are in the same hand, the case is covered by *Vint* v. *Padget.*

1894. March 16. ROMER, J.:—

In this case I do not see my way to decide against the Defendants' claim.

(1) 2 De G. & J. 611. (2) 19 Ch. D. 630. (3) *Ante,* p. 321.

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Speaking for myself, I have never been able to appreciate the justice or equity of the principle of consolidation of securities, and certainly I would not extend the cases in favour of consolidation one jot. But I cannot refuse to recognise the settled law on the subject, and this is what, in my opinion, I should be doing in the present case if I decided adversely to the Defendants.

Let me first state shortly what the facts of this case are, so far as relevant to the point to be decided. A mortgagor, the owner of several properties, mortgages them to different mortgagees for distinct sums; I will call these mortgages the prior mortgages. The mortgagor then, by deed dated the 20th of August, 1868, mortgages all these properties together, to secure one sum (subject as to the different properties affected to the prior mortgages thereon) to the Plaintiff's predecessors in title. On the 1st of April, 1885, the mortgage of the 20th of August, 1868, is transferred to the Plaintiff. Now, on the 20th of August, 1868, several of the prior mortgages remained vested in different mortgagees; but before the Plaintiff brings this action against the Defendants to redeem them, all the prior mortgages have been transferred to or become vested in them.

And under these circumstances the Defendants say, and it appears to me rightly, that the Plaintiff cannot redeem as against them some of the properties included in his mortgage of the 20th of August, 1868, of which they are mortgagees, without redeeming all.

I think that this contention of the Defendants is supported both on settled principle and by authorities, which, at the present day, the Plaintiff cannot challenge and I cannot disregard.

First, as to principle. It is settled that, if an owner of two properties mortgages one to *A.* and the other to *B.*, and then *A.'s* mortgage is transferred to *B.*, or both are transferred to *C.*, the owner cannot after that redeem *B.* in the one case or *C.* in the other, of one of his securities, without redeeming the other security. It is also settled that the right to consolidate is enforceable, not only against the original mortgagor himself, but also, as a rule, against his assignee of the equity of redemption.

Applying these principles to the present case, if the original mortgagor himself had come to redeem the Defendants after all the mortgages became vested in them, he could not have redeemed one of their securities without redeeming the others. And the Plaintiff, being his assignee, by one deed, of all the properties subject to the Defendants' mortgages, is in no better position.

Then, as to the authorities, the precise case before me was decided, in 1857, in *Tweedale* v. *Tweedale* (1), and, in 1858, in *Vint* v. *Padget* (2), and possibly it has been decided in other cases. And I cannot find any adverse authority, nor can I find in any reported case any doubt thrown on these cases or on the principles on which they rest. The cases of *White* v. *Hillacre* (3), *Jennings* v. *Jordan* (4), and *Harter* v. *Colman* (5), were cases where the assignee, whose right of redemption was in question, was the assignee of one property only, and were governed by different considerations. And in *Harter* v. *Colman*, Mr. Justice *Fry* (6) distinguishes *Vint* v. *Padget* on this ground, and points out the principle governing cases like *Vint* v. *Padget;* and certainly he expresses no doubt as to the soundness of the decision in *Vint* v. *Padget*, or of the principles on which it was decided.

Of course the Defendants' right will only extend to their mortgages on the properties of which the Plaintiff remains the owner of the equity of redemption. For instance, it will not extend to the premises Nos. 1 and 2, *Shakespeare Terrace*, the subject of the action of *Minter* v. *Carr* (7).

I ought perhaps to add that no objection has been taken as to absence of any party, and that I have been asked to decide the question of the right to consolidation as between the Plaintiff and Defendants alone, and have accordingly done so.

Solicitors for Plaintiff: *A. R. & H. Steele*, agents for *J. Minter, Folkestone.*

Solicitors for Defendants: *Talbot & Tasker.*

(1) 23 Beav. 341.
(2) 1 Giff. 446; on appeal 2 De G. & J. 611.
(3) 3 Y. & C. Ex. 597.
(4) 6 App. Cas. 698.
(5) 19 Ch. D. 630.
(6) Ibid. 635.
(7) *Ante*, p. 321.

F. E.

ROMER, J

1894

April 3.

JONES v. DANIEL.

[1893 J. 795.]

Vendor and Purchaser—Letters—Reference to Formal Contract—Specific Performance.

In reply to a written offer by *A.* to purchase *B.'s* property for £1450, *B.'s* solicitors wrote accepting the offer, and continued, "We enclose contract for your signature. On receipt of this signed by you across the stamp and deposit we will send you copy signed by him." The enclosure was a contract with usual conditions of sale providing for a deposit of 10 per cent., fixing a date for completion, and limiting the period of *B.'s* title. Three days afterwards *B.'s* solicitors again wrote *A.*, "Kindly let us know whether we shall send abstract of title to you or to a solicitor for you. At the same time perhaps you will send us deposit. In order to define time for delivery of abstract and for completion, the contract sent you had better perhaps be signed, though the correspondence is a sufficient contract." *A.* returned the enclosure unsigned:—

Held, that the letters did not constitute a contract.

Crossley v. *Maycock* (1) followed.

Gibbins v. *Board of Management of North Eastern Metropolitan Asylum District* (2) distinguished.

THE Plaintiff, *W. Jones*, was the owner in fee simple of some land at *Llandaff*, in the county of *Glamorgan*, subject to certain leases for ninety-nine years, and about the 6th of April, 1893, the Defendant made a verbal offer of £1450 for the property to Mr. *John Jones*, a member of the firm of *Lewis & Jones*, the Plaintiff's solicitors. After some correspondence the Defendant on the 22nd of April wrote Messrs. *Lewis & Jones* as follows:—

"I may say in respect to this property the offer I made you of £1450 is my fullest, and in the present unsatisfactory definition of the leases, and the imperfect drainage and difficulties attendant thereon, it is more than its real value."

On the 26th of April the Plaintiff's said solicitors wrote the Defendant the following reply:—

"Mr. *W. Jones* has considered your offer of £1450 for his reversionary interest in this property. He thinks it very low,

(1) Law Rep. 18 Eq. 180. (2) 11 Beav. 1.

but . . . he accepts it, and we enclose contract for your signature. On receipt of this signed by you across the stamp and deposit we will send you copy signed by him."

The document enclosed in this letter comprised usual conditions of sale with memorandum of contract indorsed, partly printed and partly written, and stipulated (*inter alia*) for a deposit of £10 per cent. on the purchase-money, for completion on the 24th of May then next, and that the vendor's title should commence with a conveyance dated in 1865.

On the 29th of April the Plaintiff's said solicitors, not having received an answer from the Defendant, wrote him again:—

"Kindly let us know whether we shall send abstract of title to you or to a solicitor for you. At the same time perhaps you will send us deposit. In order to define time for delivery of abstract and for completion, the contract sent you had better perhaps be signed, though the correspondence is a sufficient contract. Will you please send it us?"

And on the 3rd of May they again wrote the Defendant:—

"We have been expecting to hear from you in answer to our letters. Kindly let us know where we are to send abstract of title so that we may proceed with the matter."

On the 4th of May the Defendant wrote the Plaintiff's said solicitors, declining to purchase, and returning the document unsigned. The Plaintiff thereupon brought this action for specific performance of the contract for sale, which he alleged was comprised in the above letters. The Defendant denied that the letters constituted a contract, and relied on the *Statute of Frauds*.

Neville, Q.C., and *H. W. Challis*, for the Plaintiff:—

The letters of the 22nd and 26th of April constitute a binding contract, and the mere fact that the Plaintiff desired a more formal document to be signed will not of itself prevent the Court from enforcing the agreement that had been arrived at: *Rossiter* v. *Miller* (1); *Crossley* v. *Maycock* (2); *Bonnewell* v. *Jenkins* (3).

(1) 3 App. Cas. 1124. (2) Law Rep. 18 Eq. 180.
(3) 8 Ch. D. 70.

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But if the letter of the 26th of April was a conditional acceptance, the condition was waived by the letter of the 29th of April. After our letters of the 29th of April and the 3rd of May, the Defendant could have sued us for specific performance, and we should have had no answer. The case most like the present is *Gibbins* v. *Board of Management of North Eastern Metropolitan Asylum District* (1), in which specific performance was decreed.

Haldane, Q.C., and *David*, for the Defendant:—

There was no concluded agreement here. The letters were mere negotiations, and nothing binding was intended until the formal document was signed: *Crossley* v. *Maycock* (2); *Bonnewell* v. *Jenkins* (3); *Bristol, Cardiff, and Swansea Aerated Bread Company* v. *Maggs* (4); *Hussey* v. *Horne-Payne* (5). The test is, did the formal document contain new terms? Here it is clear that it did, for it stipulated for a deposit, and restricted the period of the Plaintiff's title, and these terms were not accepted. The letter of the 29th of April was no waiver of the formal contract, because it asked for the deposit. *Gibbins* v. *Board of Management of North Eastern Metropolitan Asylum District* is distinguishable. There the bill alleged that the document enclosed in the letter merely embodied the contract in a more formal manner, and was in the possession of the defendant, and that allegation was assumed to be true because the defendant did not produce the document.

Neville, in reply.

ROMER, J.:—

I think that the Plaintiff's case fails. It is clear that here there was no contract between these parties, apart from the letters, and that, if the letters do not shew a concluded agreement then there was none. I need only refer, in the first instance, to the letter of the 26th of April, 1893. The Defendant had made an offer for the property, and had stated the price he was willing

(1) 11 Beav. 1.
(2) Law Rep. 18 Eq. 180.
(3) 8 Ch. D. 70.
(4) 44 Ch. D. 616.
(5) 4 App. Cas. 311.

to give. Then the letter of the 26th of April states that the Plaintiff, who was the vendor, accepted the offer, and added, "we enclose contract for your signature. On receipt of this signed by you across the stamp and deposit we will send you copy signed by him." I turn to the enclosure in that letter, and I find it is a document which contains special terms which had never been referred to in the offer, and those terms include a payment of a deposit of 10 per cent. by the purchaser, a stipulation fixing the day for completion, a provision limiting the title to be shewn by the vendor, and other important conditions. Now, what would anybody when he received that letter fairly understand to be the meaning of it? Certainly I think he would understand it to mean this: "So far as the price is concerned we are agreed. I now enclose you terms which I require you to assent to. If you assent to them and sign them and pay the deposit, then there will be a binding contract between us, but not till then." I think that is what the letter really meant, and what it was intended to mean. It was not an acceptance *simpliciter* of the Defendant's offer forming a contract, and a mere reference to an enclosed document as carrying out the contract so made. In my opinion, it would not have been fair as against the Plaintiff to have said on behalf of the Defendant, if he had been willing so to say immediately he received that letter, that the Plaintiff was bound by an absolute contract for £1450 without obtaining a deposit and without any conditions whatever as to title or otherwise. I do not think that that was the Plaintiff's intention. When I speak of him, I, of course, speak of the solicitors who were acting for him. This observation in his favour also shews that that letter cannot be treated as a simple acceptance of the Defendant's offer. Then what happens after this? Nothing, practically. The Defendant does nothing. He does not accept what I may call the counter offer of the Plaintiff, and, as time goes by, apparently the Plaintiff's solicitors feeling a little anxious, write the letter of the 29th of April, 1893. Now what was the meaning of that letter? I do not gather that that letter amounted to this: "I withdraw the terms I was insisting upon by my letter of the 26th of April, 1893, and I give you now to understand that I accept unconditionally, and

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without requiring any other terms on your part, your offer of £1450." I do not think that that is the fair interpretation to put on that letter. He does not purport by the letter of the 29th of April in itself to form a contract. All he says in that letter is that "the correspondence," and by that I clearly understand the writer to mean the prior correspondence, is a sufficient contract; and it is noticeable in that very letter the writers refer again to the deposit. Certainly, if a contract valid and binding had not been come to before the letter of the 29th of April, it was not made by that letter. I will only say one word as to the cases which have been cited. I think the case that really comes nearest to the present is *Crossley* v. *Maycock* (1); and in my opinion the case of *Gibbins* v. *Board of Management of North Eastern Metropolitan Asylum District* (2), on which the Plaintiff relied, is distinguishable. In that case it was alleged in the bill that an enclosure sent to the defendant was only a formal document merely embodying the contract constituted by an offer and an acceptance. The defendant, in whose possession the document was, did not choose to produce it, and therefore it was assumed, as against him, that that allegation in the bill was correct. Consequently, it was not a case where, simultaneously with a letter purporting to accept an offer, a document is sent requiring by the person sending it to be signed by the person to whom it was sent, and containing additional and important terms. That case, therefore, is not an authority for the case before me; and as I have said, I think the real binding authority is that of *Crossley* v. *Maycock*. I need make no further observations as to the other cases which have been referred to. The action fails, and must be dismissed with costs.

Solicitors for Plaintiff: *Bell, Brodrick & Gray*, agents for *Lewis & Jones, Merthyr Tydfil.*

Solicitors for Defendant: *W. H. Martin & Co.*, agents for *George David & Evans, Cardiff.*

(1) Law Rep. 18 Eq. 180. (2) 11 Beav. 1.

H. L. F.

ATTORNEY-GENERAL *v.* CORPORATION OF CARDIFF.

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April 16, 17

[1893 A. 1116.]

Municipal Corporation—Borough Funds—Misapplication—Ultrà vires—Subsidy to a College—Additions to Mayor's Salary—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *ss.* 143, 144—*Cardiff Corporation Act*, 1884 (47 & 48 *Vict. c. ccxxii.*), *s.* 32.

The Corporation of *Cardiff* were empowered by their special Act to contribute £10,000 towards the purchase of a site for a college, and passed a resolution that that sum should be paid on certain property being conveyed to the college authorities. The intended purchase remained in abeyance, and the college was carried on at suitable premises rented for the purpose by the council of the college:—

Held, that the payment of a sum of £400 out of the borough fund by the corporation to the college, being one year's interest at 4 per cent. on the proposed contribution of £10,000, could not be justified, either under the special Act, or as a payment "for the public benefit of the inhabitants and improvement of the borough" within the meaning of sect. 143 of the *Municipal Corporations Act*, 1882:

But *held*, that the payment out of the borough fund of a sum of £650, which by a resolution of the corporation was added to the mayor's salary for the year 1893 for the purpose of celebrating the marriage of the Duke and Duchess of *York*, which in fact was not paid to the mayor, but was carried to a separate account and expended for that purpose under the direction of a marriage committee, was not illegal.

A payment made in form by way of addition to a mayor's salary is not legal unless it is a *bonâ fide* increase of salary.

THIS was an action commenced in the name of the Attorney-General, at the relation of certain burgesses and ratepayers of the borough of *Cardiff*, against the Corporation of *Cardiff* and *W. Vaughan* and *J. Rees*, claiming a declaration that certain payments out of the borough fund were unauthorized and illegal.

The questions at issue turned mainly on the following statutory enactments.

The *Municipal Corporations Act*, 1882, s. 143, provides that if the borough fund is more than sufficient for the purposes for which it is applicable under this Act, or otherwise by law, the surplus thereof shall be applied, under the direction of the council,

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for the public benefit of the inhabitants and improvement of the borough. By sect. 144, if the borough fund was insufficient for the purposes to which it was applicable under the Act, the council were empowered to make a borough rate sufficient to make up the deficiency.

The *Cardiff Corporation Act*, 1884, s. 32, after reciting that there was about to be established and incorporated by Royal Charter within the borough a college to be endowed by parliamentary grants and called "*The University College of South Wales and Monmouthshire*," and that it was expedient that the corporation be authorized to contribute the sum of £10,000 towards the cost of the said college, or out of the said sum to acquire certain lands and property in the borough as and for a site for the erection thereon of the said college, enacted (subsect. 1): "The corporation may contribute towards the fund of the *University College of South Wales and Monmouthshire*, any sum or sums not exceeding in the whole £10,000, and they may appropriate the whole or any portion of such sum or sums to or towards the acquisition of the land described in Part I. of the First Schedule to this Act, or other suitable or convenient site for the said college, and, if a suitable and convenient site can be obtained for less than that amount, the corporation may, if they think fit, contribute the balance remaining of the said sum or any part thereof towards the cost of erecting on such site suitable buildings and premises for the purposes of the said college."

The borough fund had for years been insufficient for the purposes to which it was applicable, and the council of the borough had every year raised a borough rate in order to provide such funds as, together with the borough fund, would be sufficient for such purposes.

On the 8th of December, 1890, the council passed the following resolution: "That this corporation hereby approve of the council of the *University College of South Wales and Monmouthshire* purchasing the site and buildings known as the old infirmary for the purposes of the college, subject to the withdrawal of the notice to treat served upon the Marquis of *Bute* for a site in *Cathedral Road* being arranged.

"That the borough treasurer be authorized to pay the said sum of £10,000 at the time the building is conveyed to the college council by the trustees of the new infirmary."

No part of the £10,000 had been paid by the corporation under these resolutions, as the college was now located and being carried on at suitable premises which were rented for the purpose.

The Defendant *T. Rees* was the mayor of the borough for the year ending the 9th of November, 1892, and in that month the council passed a resolution "that the sum of £400, being the amount of interest at 4 per cent. upon the sum of £10,000 (the proposed contribution to the *University College*) be added to the mayor's salary for the current year," and in accordance with such resolution the sum of £400 was paid out of the borough fund to the Defendant *T. Rees*, and by him paid over to the college. In June, 1893, the registrar of the college applied to the corporation for the payment of a sum of £350 on account of the interest on the said sum of £10,000; and in July, 1893, the council, on the recommendation of their finance committee, resolved to make the payment; but it had not as yet been actually made.

The Defendant *W. Vaughan* was the mayor of the borough for the year ending the 9th of November, 1893; and in June, 1893, the council passed a resolution, "that the sum of £650 be added to the mayor's salary for the current year for the purpose of celebrating the marriage of" the Duke and Duchess of *York*. In pursuance of this resolution the sum of £650 was paid out of the borough funds, not directly to the Defendant *Vaughan*, but it was carried to a separate account, and was applied under the direction of a marriage committee in celebrating the said marriage by (*inter alia*) providing teas and commemorative medals for the children attending the schools within the borough.

The Plaintiffs claimed a declaration, that the application in manner and for the purposes above mentioned of any part of the borough fund was unlawful, and beyond the powers of the Defendants and a breach of trust; that the Defendants *Rees* and *Vaughan* might be ordered to replace the sums of £400 and £650; and an injunction restraining the Defendants from directly or

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indirectly applying the borough fund for any purpose not authorized by law.

Haldane, Q.C., and *O. L. Clare*, for the Plaintiffs:—

As to the payment of interest, the corporation are only authorized by their special Act to contribute to "the cost of" the college, and that is defined by sect. 32 to mean the purchase of a site or the erection of buildings. It was never intended by this Act to authorize the corporation to contribute to the maintenance of the college or to the salaries of the professors of the college. Nor can these payments be supported as an application of the surplus of the borough fund under sect. 143 of the *Municipal Corporations Act*, 1882. The "borough fund" there means the income of the corporate property, and not a composite fund arising from rates and the borough fund proper. But even if it does, this payment of interest cannot be said to be "for the public benefit of the inhabitants and improvement of the borough" within the true meaning of the section. Then as to the £650, we admit that a municipal corporation may make additions to the mayor's salary to meet additional expenditure contemplated in his year of office by reason of some occurrence of national importance; but it must be an unconditional increase of salary, and must be paid over to him to spend as he thinks fit. Here, under colour of an addition to the mayor's salary, the £650 was carried to a separate account, and dealt with by a marriage committee. It was clearly an irregular proceeding.

Neville, Q.C., and *Woodfall*, for the Defendants:—

If the payment of interest was not strictly within the powers of the corporation under their special Act, yet the observations of Lord *Herschell* in *Mayor of Newcastle-upon-Tyne* v. *Attorney-General* (1) support the view that a corporation under its general powers can deal with an accidental surplus of its borough funds in this way. We submit that establishing and maintaining a college in a town is generally "for the public benefit of the inhabitants," at any rate for all those inhabitants who as tradesmen and otherwise deal with the college. The corpora-

(1) [1892] A. C. 568, 575.

tion, however, are willing to give an undertaking not to pay the £350 or to make any future payments of interest to the college. As to the £650, that was within the powers of the corporation, and falls within the principle of the *Attorney-General* v. *Corporation of Blackburn* (1).

Haldane, in reply:—

We do not desire that these sums shall be replaced by the Defendants; but we ask the judgment of the Court on the questions of principle raised by the action. We are willing to accept the undertaking offered by the Defendants.

ROMER, J.:—

Of course it is clear that the corporation are not entitled to make a colourable addition to the mayor's salary merely that the addition may be applied in making payments which would not be justified if those payments were made directly by the corporation. With that preliminary observation, I will consider shortly the case brought before me.

The first part of the case relates to payments of £350 and £400. The corporation passed a resolution, in pursuance of the powers given to them by the Act of 1884, that the £10,000 they were authorized to subscribe to *University College*, and mentioned in sect. 32 of that Act, should be paid in a certain event which has not yet occurred. Then they passed certain resolutions purporting to authorize yearly payments on account of the interest on the £10,000 in the meantime. The £350 and the £400 were two such interest payments, and the question is, Were they authorized? The first question is, Were they authorized by the special Act of the corporation of 1884? Now, I can find nothing in sect. 32 of that Act, or in any other part of that Act, which authorizes the corporation to pay interest on the £10,000 before the £10,000 is paid over; and therefore I must state that the payments, in my opinion, of interest on the £10,000 were not authorized under that Act.

The next question is, Were those payments of interest authorized from the corporation's general fund? It is said that

(1) 57 L. T. (N.S.) 385.

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they were authorized under sect. 143 of the general Act of 1882. But, in my opinion, putting aside the question as to a surplus (with regard to which I need say nothing in this case), I cannot see that payments of these sums by way of interest were payments "for the public benefit of the inhabitants and improvement of the borough" within the meaning of those words as used in that section. No doubt in some way an advantage may be given to some of the inhabitants of a borough by having a flourishing concern like a university college in the midst of the borough, but I cannot see that subsidizing a college in a town can be said to be for the benefit of the inhabitants and improvement of the borough within the meaning of the words as used in sect. 143; and clearly, if there was no surplus, the payments by way of interest for such a purpose could not be made out of the borough fund generally. That, I think, is free from doubt. It follows that in my opinion the payments by way of interest were unauthorized.

The next question concerns the addition of £650 made to the mayor's salary because, in the year in which that addition was made, it was anticipated an expenditure would be made in celebrating the marriage of the Duke of *York*. Now, the corporation is undoubtedly entitled to make a reasonable addition to the mayor's salary if it be anticipated that in his year of office, by reason of the occurrence of some event of national importance, his expenditure as mayor in festivities and so forth may be increased, and any resolutions *bonâ fide* passed increasing his salary in such a case could not be impeached. The question is, Was the resolution in the present instance, increasing the salary by the sum of £650, passed *bonâ fide*? I am bound to say that I have felt considerable doubt on this matter by reason of the facts, amongst others, of the appointment of a marriage committee, and of the cheque for payment of the £650 being dealt with separately from the rest of the mayor's salary, being drawn to a particular account, and carried, I notice, to a separate bank account. But on the whole I will, in this particular case, give the corporation the benefit of the doubt; and therefore I shall not decide adversely to them with regard to this particular sum of £650. But I have no doubt what I have said will be

a guide to the corporation in any future payments of the kind which may have to be made. If payments are desired to be made which are not intended to be really a simple increase to a mayor's salary, they should not, in my opinion, be made by way of additions to the mayor's salary; they ought to be made directly, so that they may be directly challenged if wrong and impeached. No addition should be made to the mayor's salary except it is intended merely for the purpose of the salary, so that the mayor may deal with it in any way he thinks fit as part of his salary. The parties in the present case have not asked that any sums which may have been paid on account of the interest to the *University College* should be repaid; and all I need do, therefore, is to take from the Defendant, the corporation, an undertaking (which I understand they are willing to give) that they will not pay either the £350 or any future payments to the *University College* by way of interest on the £10,000. I do not know if any arrangement has been made as to costs, but I think it is a proper case for the costs of all parties to be paid out of the borough funds.

Solicitor for Plaintiffs: *H. P. Becher*, agent for *Simons & Sons, Merthyr Tydfil.*

Solicitors for Defendants: *Andrew & White*, agents for *J. L. Wheatley, Town Clerk, Cardiff.*

H. L. F.

VAUGHAN WILLIAMS, J.

1894 Feb 28

In re NEW TERRAS TIN MINING COMPANY.

[0064 of 1894.]

Company—Winding-up—Stannaries Court—Jurisdiction—Company "formed for working Mines within the Stannaries"—Voluntary Liquidation—Transfer of Application—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 81, 141—*Companies (Winding-up) Act,* 1890 (53 & 54 *Vict. c.* 63), *ss.* 1 (*sub-ss.* 1, 2, 4), 3, 32.

Where a company is formed for working mines within the Stannaries "or elsewhere in *England*," but is not shewn to be actually working mines beyond the limits of the Stannaries, the Court having jurisdiction to wind it up, or to entertain an application in its voluntary winding-up, is the Stannaries Court; and where an application in the voluntary winding-up has been made to that Court, the High Court will not exercise its power to retain subsequent applications before itself, but will transfer them to the Stannaries Court:—

Semble, that, having regard to the repeal of sect. 81 of the *Companies Act*, 1862, and to sect. 1 of the *Companies (Winding-up) Act*, 1890, *In re Silver Valley Mines* (1) is no longer law.

THE *New Terras Tin Mining Company, Limited,* was registered in 1882, and its memorandum of association provided that its registered office should be situated in *England*, and stated that one of its objects should be "to purchase, or otherwise acquire and work mines, minerals, and mining rights, lands, and hereditaments in the county of *Cornwall* or elsewhere in *England*."

The company had been engaged in working a mine in *Cornwall*, but there was no evidence to shew that it had worked a mine elsewhere. It was not at the date of the proceedings mentioned below engaged in working any mine. Its registered office was in *London*.

In 1890 resolutions were passed that the company should be wound up voluntarily.

On the 5th of January, 1894, a summons was taken out by a contributory in the Court of the Vice-Warden of the Stannaries, on which summons, on the 17th of January, 1894, an order, by consent, was made as follows: "The Applicant undertaking to verify his alleged debt, if and when required to do so by the

(1) 18 Ch. D. 472.

liquidator, and the liquidator undertaking to proceed to settle the claim with all reasonable dispatch, and not to enforce the call made in November, 1893, in respect of the 2603 shares held by the Applicant, which were issued to him at a discount, pending the allowance or disallowance of the Applicant's debt or claim, and until the liquidator is prepared to settle the same if allowed, the Court doth not think fit to make any order except that by consent the liquidator retain his costs out of the assets, and that the costs of drawing up and settling this order be borne by this company, and that liberty be reserved to enforce the above undertaking."

On the 28th of February, 1894, certain contributories moved for the removal of the liquidator, and the appointment of another person in his place.

Oswald, Q.C., and *Bramwell Davis*, in support of the motion.

Micklem, for the liquidator:—

There is a preliminary objection that the application ought to have been made in the Stannaries Court. The application is made under sect. 141 of the *Companies Act*, 1862, which enables "the Court" to remove a voluntary liquidator. Sect. 81 of the same Act gave a definition of "the Court" "as used in this Part of the Act"—that is to say, Part IV.—but that section was repealed by sect. 33 of the *Companies (Winding-up) Act*, 1890. Sect. 32, sub-sect. 2, of that Act says that, "In Part IV. of the *Companies Act*, 1862, and in this Act the expression 'the Court,' when used in relation to a company shall, unless the contrary intention appears, mean the Court having jurisdiction under this Act to wind up the company."

By sect. 1, sub-sect. 1, jurisdiction to wind up is given to the High Court of Justice, the Stannaries Court, and other Courts. By sub-sect. 2, where the capital exceeds £10,000 the jurisdiction is given to the High Court; but by sub-sect. 4 it is "provided that where a company is formed for working mines within the Stannaries and is not shewn to be actually working mines beyond the limits of the Stannaries, or to be engaged in any other undertaking beyond those limits, or to have entered into

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a contract for such working or undertaking, a petition to wind up the company . . . shall be presented to the Stannaries Court whatever may be the amount of the capital of the company, and wherever the registered office of the company is situate." The combined effect of the sections is that the jurisdiction to entertain an application like this is in the Stannaries Court, subject to the power (if any) of this Court under sect. 3, sub-sect. 1, to retain the proceedings, although this is not the Court in which they ought to have been commenced. But sect. 3, sub-sect. 1, does not expressly refer to voluntary winding up, and according to a decision of Mr. Justice *Chitty*, the Act of 1890 does not apply to voluntary winding up: *In re Watson & Sons* (1).

[VAUGHAN WILLIAMS, J.:—That only means that, speaking generally, the Act does not apply to voluntary winding up. It does not follow that a clause does not apply to voluntary winding up because that mode of liquidation is not expressly mentioned. In four-fifths of the section the enactment is restricted to winding up "by the Court"; but where there is no such restriction the enactment may apply to other kinds of liquidation. For instance, I have held that sect. 15 applies in the case of voluntary winding up: *In re Stock and Share Auction and Banking Company* (2).]

Assuming this Court has jurisdiction, it ought not to be exercised in a case like this, for at any rate the Stannaries Court has a primary jurisdiction, and one application in the liquidation has already been made to that Court.

[VAUGHAN WILLIAMS, J.:—*Primâ facie* the proceeding ought to be transferred to the Stannaries Court.]

That was the course taken by Mr. Justice *Stirling* in *Re Buller and Basset Tin and Copper Company* (3).

Oswald, Q.C., and *Bramwell Davis*:—

As regards the question whether the application would be more conveniently heard here or transferred to the Stannaries Court, it is obvious from the fact of the company's registered

(1) [1891] 2 Ch. 55. (2) [1894] 1 Ch. 736.
(3) 35 Sol. J. 260.

office, and all the parties interested being in *London*, that it would be wise to follow the former course.

But it is unnecessary to consider whether the power of retainer, under sect. 3, sub-sect. 1, of 1890, should be exercised; for the jurisdiction is in the High Court.

The object of the company is to work mines in *England*. The words "in *Cornwall* or elsewhere" in the memorandum of association are mere surplusage. The words "in *Cornwall* or elsewhere in *England*" have already been interpreted by the Court of Appeal as not meaning that the company was formed to work mines in *Cornwall*, it being pointed out that the company might, consistently with a memorandum of association containing such words, "have a mine in *Derbyshire* and not in *Cornwall*": *In re Silver Valley Mines* (1).

[VAUGHAN WILLIAMS, J.:—The point in that case was as to the meaning of "engaged in working mines" as used in sect. 81 of the Act of 1862. Sir *John Romilly*, M.R., had held, in *Re East Botallack Consolidated Mining Company* (2), that a company was within the section if it was formed to work a mine in *Cornwall*, although it never possessed or worked a mine there. That decision was disapproved of in *In re Silver Valley Mines*; but now sect. 81 of 1862 has been repealed, and the new enactment (sect. 1, sub-sect. 4, of 1890) substitutes for "engaged in working mines" the words "formed for working mines," and thus makes Lord *Romilly's* decision law. The jurisdiction can only be ousted by shewing that the company is working a mine elsewhere than in the Stannaries jurisdiction.]

But *In re Silver Valley Mines* decides that a company like this is "not really formed for the purpose of working mines in *Cornwall*."

Even where the mine was within the Stannaries jurisdiction, but had been sold, Mr. Justice *Kay* held that the High Court had jurisdiction to entertain an application under sect. 141 of the Act of 1862: *In re North Molton Mining Company* (3). In *Re Buller and Basset Tin and Copper Company* (4), the company was formed

(1) 18 Ch. D. 472, 475, 476.
(2) 34 Beav. 82.
(3) W. N. (1886) 78.
(4) 35 Sol. J. 260.

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for the purpose of working a mine within the Stannaries jurisdiction, the words "or elsewhere" being omitted. Moreover, the petition in that case was for a compulsory order. This is a voluntary liquidation, and the order by consent, deciding nothing, but made by the Stannaries Court, cannot affect the question of jurisdiction.

VAUGHAN WILLIAMS, J.:—

I am of opinion that under the circumstances of this case the jurisdiction is *primâ facie* in the Stannaries Court. I think this company was formed for the purpose of working mines within the limits of the Stannaries, although not exclusively within those limits; and the moment this appears, I think that, having regard to the wording of sect. 1, sub-sect. 4, of the *Companies (Winding-up) Act*, 1890, the jurisdiction is in the Stannaries Court until it is proved that the company has been "actually working mines beyond the limits of the Stannaries." I will give the Applicants an opportunity of shewing that this company has been working mines beyond such limits; but in the meantime I decline to exercise my power of retaining the case here, having regard to the fact that proceedings have already been taken in the Stannaries Court in this liquidation.

Oswald said the Applicants did not wish to adduce further evidence.

VAUGHAN WILLIAMS, J.:—

Then the application must be transferred to the Stannaries Court, and the costs will be dealt with by the Vice-Warden.

Solicitors: *Lewis W. Gregory; J. A. Maxwell.*

F. E.

In re A COMPANY.

[0089 of 1894.]

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March 21; *April* 18

Company—Winding-up—Abuse of Process—Demurrable Petition—Restraining Advertisement of Petition—Staying Proceedings—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 85—*Companies Act,* 1867 (30 & 31 *Vict. c.* 131), *s.* 40.

Where a petition against a company is presented ostensibly for a winding-up order, but really for another purpose, such as putting pressure on a company, the Court has an inherent jurisdiction to prevent such an abuse of process, and will do so, without requiring an action to be commenced, by restraining the advertisement of the petition, and staying all proceedings upon it.

ON the 20th of March, 1894, a petition was presented asking that a company limited by shares might be wound up by the Court.

The petition alleged that the company had no money in hand to meet the expenses of promotion and of certain experiments, and that there appeared to be "an absence of *bonâ fide* intention on the part of those responsible for the management of the company to carry on business in a proper manner, and there are matters to be investigated in connection with the promotion of the company," and that under these and other circumstances alleged in the petition it was just and equitable that the company should be wound up.

Paragraph 11 of the petition was as follows: "Your Petitioner holds 800 shares in the capital of the company, which said shares are fully paid; and although your Petitioner was not the original allottee of such shares, he was entitled *de jure* to have had the same originally allotted to him, and claims to be considered as an original allottee."

On the 21st of March, 1894, after the petition had been presented and answered, but before it had been advertised or come into the paper for hearing, the company moved *ex parte* in the matter of the petition for an interim injunction to restrain the Petitioner from advertising the petition.

The evidence filed in support of the motion shewed that the

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Petitioner became a shareholder, and then only by transfer from another person, on the 14th of February, 1894.

Buckley, Q.C., and *Bethune-Baker*, in support of the application:—

The petition is demurrable, inasmuch as it states no real ground for winding up. Moreover, the Petitioner is neither an original allottee of shares, nor the holder of shares which have been registered in his name for six months, and is therefore not capable of presenting such a petition as this: *Companies Act*, 1867, s. 40. It is obvious that the advertisement of a winding-up petition will do the company great harm; and, if the Petitioner's chance of success is hopeless, he ought to be prevented from advertising. This has sometimes been done by obtaining an injunction in a separate action; but there seems to be jurisdiction to make such an order in the winding-up proceeding itself: *Companies Act*, 1862, s. 85.

VAUGHAN WILLIAMS, J.:—

That seems to relate only to restraining proceedings other than those taken with a view to obtaining a winding-up order. But the Court has an inherent jurisdiction to stay proceedings where they amount to an abuse of its process. That is a well-recognised principle. You may take an interim order, extending over the next petition day, which will be the first petition day in next sittings, restraining the advertisement of the petition, with liberty to the Petitioner to apply, and if necessary to the Vacation Judge, to discharge the order. It is suggested to me that the Applicants should give an undertaking as to damages, and I think the usual undertaking should be given. The Applicants must also give notice to the Petitioner of the order which has been made.

On the 3rd of April, 1894, the company served short notice of motion on the Petitioner for an injunction restraining him from advertising the petition, and restraining all further proceedings upon the petition.

The motion was eventually heard on the 18th of April, 1894.

Buckley, Q.C., and *Bethune-Baker*, for the company, asked that the injunction should be continued.

Farwell, Q.C., and *R. J. Parker*, for the Petitioner:—

The company allotted the shares to the wrong person, and ought not to be allowed to avail themselves of sect. 40 of the *Companies Act*, 1867. In equity what ought to have been done must be taken as having been done, and the Petitioner should be treated as an original allottee.

[VAUGHAN WILLIAMS, J.:—There is an express statutory provision as to the qualification of a contributory to present a winding-up petition, and that cannot be modified by saying that he ought to be in a position in which he is not. The provisions of sect. 40 are not complied with, and I see no reason why the company should not set up that defence.]

The petition may perhaps be demurrable on that ground; but it is not a reason for restraining the advertisement of the petition, which is a strong measure, and should only be done, we submit, in such a case as the presentation of a petition by a person who is not a real creditor, but presents a petition as such for blackmailing purposes.

VAUGHAN WILLIAMS, J.:—

In my judgment, if I am satisfied that a petition is not presented in good faith and for the legitimate purpose of obtaining a winding-up order, but for other purposes, such as putting pressure on the company, I ought to stop it if its continuance is likely to cause damage to the company. I think those reasons apply in the present case, and that the injunction ought to be granted. I make the order asked for, restraining the advertisement of the petition, and staying all further proceedings upon it, and the Petitioner must pay the company's costs.

Solicitors: *Dix & Warlow*, agents for *G. L. Welford, Manchester*; *J. R. Hall*, agent for *W. Vernon Ogden, Manchester.*

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Jan 24, 25, 27, 30; *Feb.* 14; *March* 12, 16.

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[00241 of 1893.]

Building Society — Unincorporated Society — Winding-up — Insolvency — Ordinary Creditors and Depositors—Liability of Advanced and Unadvanced Members—Costs of Realization—Costs of Winding-up.

The liability of members of a building society (registered under the *Building Societies Act*, 1836, 6 & 7 Will. 4, c. 32) for its ordinary debts—such as rent, rates and taxes—does not depend on the doctrine of partnership, or on the contract of the members *inter se*, but on the doctrine of principal and agent; and if the assets are insufficient, the members, both advanced and unadvanced, are liable as contributories for such ordinary debts, if incurred while they are members.

But a rule purporting to empower the directors of such a society to borrow on deposit so as to bind not only its assets, but also its members personally, is *ultrà vires* to that extent, and in respect of such loans the members, advanced or unadvanced, are only under a liability which is limited to the amounts payable by them under the rules.

A building society (registered under 6 & 7 Will. 4, c. 32) had lent money to its advanced members in respect of their shares in the society. Some of the mortgages by the advanced members secured the principal advanced, and such sums as might become payable to the society under the mortgage, or the rules or bye-laws, or "in any other way." The other mortgages secured the mortgagor's instalments, subscriptions, fines, and other sums payable according to the rules.

The rules provided for the release of a member's security on his paying the amount due for principal, interest, fines, and other payments; and empowered the trustees, for the purposes of the society, to borrow sums up to a certain limit, at interest, and in order to procure such loans, to give their personal security, with a right to be indemnified out of the first funds of the society which should be received; but neither the rules nor the deposit receipts given under them purported to give any security to the depositors upon the funds or assets of the society.

The shares of both advanced and unadvanced members were of the same nominal value.

The assets of the society, when it was ordered to be wound up, were sufficient to pay the ordinary creditors, but not the depositors also, in full:—

Held, that the actual costs of realizing the properties as they existed at the commencement of the winding-up must first be paid out of the assets as they then existed, and that the rest of such assets must be applied in paying ordinary debts and loans on deposits, *pro ratâ*; that to meet the estimated costs of winding-up (other than costs of realization) a call must

be made on all the members, both advanced and unadvanced, in proportion to their shares; that the deficiency due to the ordinary creditors must also be met by calls on all the members:

Held, however, that neither advanced nor unadvanced members were liable to contribute, beyond the amounts payable on their shares under the rules and tables, to pay the deficiency due to the depositors; and that the advanced members were entitled to redeem on paying the calls above-mentioned and the amounts due under their mortgages and the rules and tables.

THE *West London and General Permanent Benefit Building Society* was formed in 1868 under the Act 6 & 7 Will. 4, c. 32, with rules which were certified on the 19th of June, 1868. The society was never registered under the *Building Societies Act*, 1874 (37 & 38 Vict. c. 42). The rules set out, or the effect of which is stated, below, were referred to in argument on the application mentioned below.

Rule 1 provided that the society should "be managed by the trustees, a board of directors, and such manager and other officers as the directors may from time to time appoint," and stated that its objects were "to raise a fund to enable its members to erect or purchase a dwelling-house or dwelling-houses; or to acquire other real or leasehold estate." Rule 2 named the first trustees, and provided as follows: "That all deeds, writings, and securities to and from this society shall be made and taken in the names of the trustees for the time being; and every person paying any money to the trustees on behalf of this society shall be indemnified against all losses, costs, and damages that may arise by reason of such payments. That the trustees shall make all payments above £25, which the directors may order on behalf of this society, by cheques upon the bankers, to be signed by one of the trustees, two directors, and countersigned by the manager."

The other rules material to this report were as follows:—

"9. The manager shall enter the name, address, and occupation of every member in a share register, which shall be accessible to each director, with the date of registry . . . . Each member shall pay annually in the month of August one shilling towards postage, printing, &c."

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Rule 10 provided that every member should be supplied with a pass-book, in which his payments should be entered, and that such entries should be signed by the manager or a director; and that he should be entitled to be supplied with a copy of the rules.

By rule 11, all fines from any members were to be part of the assets of the society, and to be employed in the increase of the general fund.

Rule 12 entitled any member to inspect his account and compare his pass-book therewith.

Rule 13 imposed fines on investing members refusing or neglecting to pay their monthly subscriptions. The same rule imposed fines on borrowing members neglecting to pay subscriptions.

"14. That all payments by way of fines that may be made by any member or members are to be considered as part of the assets of the society, and to be employed in the increase of the general fund.

"15. The shares in this society shall be divided into two classes—namely, deposit or unadvanced shares, and anticipated or advanced shares—and shall be of the value of £50, to be subscribed for in monthly payments as hereinafter specified; the entrance fee shall be £2 per share. Members paying twelve or more months' subscription in advance shall be allowed, subject to approval of the directors, a discount after the rate of £5 per cent. per annum upon each prepayment . . . . Any member, on giving notice in writing to the manager, shall be at liberty to sell or transfer his or her shares or any of them, or in case a member has purchased a right to an advance he shall be allowed to sell and transfer such right to any member of this society, or to any other person, with the consent of the directors, and agreeably to the form of transfer appended to these rules, on payment of all fines and arrears of subscriptions, and all liabilities and engagements, together with one shilling per share as transfer fee.

"16. The monthly subscriptions on deposit shares shall be 5s. per share, commencing at the meeting when such share is

first taken, and shall be continued monthly at such time and place as the directors may hereafter from time to time appoint, until the amount paid, together with the interests and profits thereon, shall be of the value of £50, but the subscriptions may be paid in advance and the shares be completed at any time.

"17. At the end of each year of the society, interest at the rate of £5 per cent. per annum, out of the profits, shall be placed to the credit of members in respect of their deposit shares, to be reckoned according to their several monthly subscriptions and annual balances remaining in the funds of the society, whether such balances shall consist of subscriptions only, or interest and bonuses, previously credited in addition thereto.

"The directors may from time to time (upon all shares that have been in existence two years) out of surplus profits, after carrying such proportion thereof as they shall deem advisable to a reserve fund, declare such bonuses as they may think fit, and place the amount thereof to the credit of members, in respect of their deposit shares, in the same manner as the annual interest hereinbefore mentioned.

"The interest and bonuses credited to members in respect of their deposit shares shall become payable only when such shares shall be realized or withdrawn, but the owners of realized shares remaining in the society may withdraw the interest to which they shall be entitled, and the same shall be payable half-yearly, and the bonuses declared in respect of such realized shares remaining in force shall be payable with the dividend.

"18. As often as the directors shall determine sums of money of not less than £50 shall be offered for sale to the members by open biddings of premiums per share per year for the allotment of such share in manner following, viz.: The bidding of such premiums shall not commence at less that 10*s.* per share; no bidding shall be less in advance than 2*s.* per share, and the highest bidder shall have the share allotted to him or her, and shall with the consent of the directors have the privilege of taking as many additional shares, or fractional parts of a share, at the same rate, as he or she may require, on giving notice of such intention at the time of sale. Should the purchaser not

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require the whole of the money offered for sale, the directors shall have power to advance the remainder at the same rate or put the same up for competition amongst the members. . .

"19. When the board shall have made an allotment of advanced shares, excepting in cases where they have otherwise ordered, the member receiving such allotment shall be at liberty to select any term of years in the subjoined table for the repayment of the shares so advanced. The first monthly payment shall become due at the first monthly meeting after receipt of the money allotted. Twelve of the annexed monthly payments are included in each year. The payments for the advanced shares shall be made at each monthly meeting. . . .

"20. That when any member shall have any advanced shares allotted to him or her, pursuant to rule 18, he or she shall give notice in writing of the nature and situation of the premises intended to be offered for the security thereof, to the manager, who shall forthwith transmit the same to the surveyors, who shall within three days, when required, after the receipt thereof, examine the premises mentioned in such notice, and make a report thereon. That when the directors shall be satisfied that the premises so to be offered as aforesaid are a sufficient security to the society, they shall direct the trustees to pay to such member the sums of money which he or she shall be entitled to receive, on such member executing such a mortgage of the premises as the solicitors of this society shall require, and depositing the same, and all other necessary title deeds relating thereto, with the trustees, as a security to the said society for the future payments on the advanced shares; and the trustees shall make such payment accordingly. . . That in the said mortgage to be executed upon the advance of any money in respect of any share or shares, it shall, in addition to other suitable and proper provisions, be provided as hereinafter mentioned, or to the like effect, namely, that in case the member taking the same shall at any time hereafter neglect or refuse for three monthly meetings to pay, or observe and perform all or any of his or her subscriptions, payments or regulations, on his or her part respectively to be paid, observed, or performed, then the trustees for the time being shall have the power to adopt any or all of the following

proceedings," viz., to proceed in the county court, appoint a receiver, or sell the mortgaged property.

"21. That if any member of this society, having received an advance on his or her share or shares, and secured the repayment thereof upon his or her premises, shall sell such premises, it shall be lawful for the purchaser to take the same, chargeable with the debt due to the society, and the purchaser shall thenceforth become answerable to the society for the payment of the subscription and other charges, as the same shall become payable; and the trustees may, at the request and cost of such member, release him or her from all future liability in respect of such share or shares. . . That if any member of this society shall be desirous of paying off and satisfying the security or securities which he or she shall have given to the society, and shall give notice of such his or her desire to the directors, they may release the same on payment of the total amount due from him or her to the society for principal, interest, fines, and other payments, and require the trustees to deliver all deeds and other documents in their custody relating to the security to such member, and, at his or her costs, to endorse a receipt or acknowledgment on such mortgage, pursuant to 6 & 7 Will. 4, c. 32, s. 5.

"22. That any member desirous of drawing his or her investments, and having been a member one year, shall by giving one month's notice in writing to the directors, at any monthly meeting, be entitled to receive back his or her net monthly subscriptions, with simple interest at the rate of 5 per cent. per annum, and in addition thereto after the second year such portion of the profits as shall be declared by the directors at the date of withdrawal. That if more than one member shall give notice to withdraw at one time, they shall be paid in rotation according to priority of notice. . . ."

"31. That the trustees, directors, and all officers of this society shall be and are hereby indemnified and saved harmless out of its funds and property from and against all losses, costs, charges, damages, and expenses which they may incur or be put unto in or about the execution of their respective offices, trusts, and services. . . ."

Only the unadvanced members shared profits, and there was

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no provision making advanced members liable to contribute to losses.

The following alterations in or additions to the rules were certified on the 19th of June, 1868:—

(In rule 20). "That the directors shall have the power of allowing (where they may think it advisable) any borrowing member to lessen or extend the term of years in which the repayment of the amount secured is spread over; and to increase or lessen the amount of the monthly repayments according to the table for such altered term, and that such alteration may be made by indorsement upon the original mortgage deed executed by such member."

(In rule 21). "After the words, 'they may release the same on payment of the total amount due from him or her to the society for principal, interest, fines, and other payments,' to insert the words, 'or upon the current scale of payment for redemption that may be from time to time issued by the directors.'"

The following addition to rule 17 was made on the 6th of July, 1870:—

"2nd. That the trustees for the time being may from time to time, as may be necessary for the purposes of the society, borrow and take up at interest any sum or sums of money from any bankers with whom the funds of the society may be deposited, or from any other person or persons, and to procure such loan or loans the trustees may give their own personal security, and they shall be indemnified out of the first funds of the society which shall be received, provided that the whole sum of money to be borrowed under this rule shall not, at any one time, exceed two-thirds of the amount for the time being secured by the mortgages of the society."

A number of persons lent money to the society on deposit. The only record as to the contracts of loan on deposit, beyond the books of the society, was the deposit receipts. These were simple receipts for money to be placed to the deposit account of the lender, with a note as to the requisite length of notice

required for withdrawal; and they did not say that the moneys were secured on the funds or assets of the society.

By an indenture of mortgage dated the 13th of October, 1877, and made between *C. E. Alsop* (thereinafter called "the mortgagor") of the one part and three persons who were trustees of the society (thereinafter called "the trustees") of the other part; After reciting that the mortgagor had applied to the directors of the society for the loan of £200 "in respect of his four advanced shares in the said society for the term of ten years," and had agreed to execute the mortgage to secure "repayment of such sums, and also to pay a premium, for such advance, of £20;" It was witnessed that, in consideration of £200, the mortgagor demised a certain leasehold house to the trustees for the residue of the leasehold term, less one day, "by way of mortgage for securing the discharge by the mortgagor of the sum of £220, being the aggregate amount of the said cash advance and premium, and such sums as may become payable by him to the said society under or by virtue of these presents or the rules or bye-laws of the said society, or in any other way." This mortgage also provided for possession of the mortgaged premises and receipt of the rent thereof, by the mortgagor, so long as he should "duly make the several payments and observe and perform the regulations prescribed by the rules of the said society in respect of his said advanced shares, and also perform all the covenants herein," and in the lease of the mortgaged premises, contained.

The mortgage also gave the trustees power, in case of the mortgagor's failure to perform all or any of such covenants, or in case the monthly payments should be in arrear, "or in case of default in observance or performance of any agreement, covenant, rule, or bye-law herein contained or incorporated by reference," to recover the moneys due, by action, to distrain, enter into possession, repair, sell, &c.; and provided that "this security shall not be redeemed or redeemable until the whole of the said sum of £220, together with all such further sums (if any) as the trustees shall have paid under or by virtue of these presents, with interest thereon at the rate of £5 per cent. per annum, and all fines due in respect thereof, and all other moneys which are

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now or which at any time hereafter may become due to the said society from the mortgagor, in respect of any share or shares in the said society, shall have been duly paid."

A great many other advanced members executed mortgages to the society which were in the same form as *Alsop's* mortgage.

By an indenture of mortgage, dated the 26th of October, 1891, and made between *W. Speller* (thereinafter called "the mortgagor") of the one part, and *W. S. Gard*, and other persons who were trustees of the society (thereinafter called "the trustees") of the other part; After reciting that "the mortgagor is the owner of six shares in the said society, and he is by the rules of the said society entitled to an advance of £300 in respect of the said shares;" It was witnessed that in consideration of £300 "the mortgagor hereby covenants with the trustees that he the mortgagor will duly and punctually pay, on the second Monday in every month during a period of four years to be computed from the month of November, 1891, the monthly subscriptions of £7 5*s*., and will pay all subscriptions, fines, and other sums of money payable according to the rules of the said society for the time being, and will in all other respects duly observe the said rules." And the mortgagor thereby, as beneficial owner, demised a leasehold house to the trustees for the residue of the leasehold term, less one day.

The mortgage also contained the following clause: "Provided always, that if the mortgagor shall duly make all payments, and observe all the rules hereinbefore covenanted to be made and observed by him, these presents shall, at the expense of the mortgagor, be vacated by a receipt to be endorsed thereon pursuant to the statute in that case made and provided."

Speller's mortgage also provided that, in case of sale under the power in that behalf, the trustees "shall retain out of the proceeds of sale all payments, costs, charges and expenses made and incurred by them relating to this security, together with all arrears and subscriptions, fines and other sums of money payable under the covenant hereinbefore contained, and such a sum as under the rules of the said society for the time being would be payable by the mortgagor for redemption, if he had elected to redeem at the month in which such sale should be completed."

A mortgage to the society by *Ann Girardet* was also in the same form as *Speller's* mortgage, and numerous other persons had executed mortgages to the society which were in the same form.

On the 20th of September, 1893, Mr. Justice *Kennedy*, sitting as Vacation Judge, made an order that the society should be wound up by the Court under the *Companies Acts*, 1862 to 1890.

At the date of this order the society owed about £1200 to its creditors, other than creditors for money lent to it on deposit, *e.g.*, for rent, rates and taxes, and wages. There was due in respect of deposits, including interest, about £70,000.

Summonses were taken out, in the winding-up, by *Alsop* and *Speller*, asking, in effect, that the advanced members of the society, who had executed mortgages to it, were entitled to redeem their mortgaged properties forthwith on payment of the amounts payable for redemption according to the tables of the society, and to be relieved of all liability as contributories; and that, in case it should be decided that they were not entitled to withdraw and be relieved of further liability in respect of their shares, it might be declared, as between them and the unadvanced members, that the latter were primarily liable to provide the amount necessary to pay the creditors of the society and the costs of liquidation.

By an order made on the 20th of December, 1893, *Speller* was appointed to represent the advanced members who had executed mortgages in the same form as that executed by him, and *Alsop* was appointed to represent advanced members who had executed mortgages in the same form as *Alsop's* mortgage, on the hearing of the summonses, the order being made without prejudice to the rights of *Ann Girardet*, whom the Official Receiver and Liquidator had allowed to redeem on payment of a certain sum, and who had issued another summons, which raised the question what the amount of her liability was, and which was directed to be heard with *Speller's* and *Alsop's* summonses. An order was also made appointing a Mr. *Phillips* to represent the unadvanced members.

It was admitted that, "apart from the amounts (if any) to be recovered from the shareholders of the said society in respect of

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their contributions to its losses, over and above the nominal value of the shares held by them, the assets of the said society will probably not realize sufficient, after providing for the payment of (1.) the costs of the liquidation, (2.) the ordinary outside creditors, to pay the said depositors in full"; "that there is due from advanced shareholders in the said society, on the security of properties mortgaged by them, the sum of £84,009 10*s.* 4*d.*"; and "that there are 128 advanced shareholders in the said society, and 201 unadvanced shareholders who have invested in the said society the sum of £47,400, or thereabouts."

The summonses were adjourned into Court, and the arguments on them took place before Mr. Justice *Wright* on the 24th, 25th, 27th, and 30th of January.

His Lordship made an order that the Official Receiver and Liquidator should represent the depositors on the hearing of the summonses.

Grosvenor Woods, Q.C., and *Warrington*, in support of *Speller's* and *Alsop's* summonses:—

The mortgagors who are in the position of the Applicants are entitled to redeem their mortgages on paying the balance of the contributions due from them under their mortgages, in accordance with the rules, and on doing so they will be free from all further liability to the society as contributories, or otherwise.

An advanced member is only a debtor to the society in respect of the amount of his share, as it becomes due, by instalments. His position differs from that of unadvanced or investing members, because the latter receive profits, but receive nothing in respect of the capital amounts of their shares, whereas the advanced member borrows up to the amount of his share, but gets no profits. He gets an advance at an early date, for which he gives security, but his interest on the advance goes to swell the profits paid to the investing members.

An advanced member in many cases only takes a share in order to obtain an advance, and is liable only to the extent of that share. Many of the cases relating to the liability of advanced members, which are collected in *Wurtzburg* on Build-

ing Societies (1), have arisen in the matter of societies registered under the *Building Societies Act*, 1874, but we rely on sect. 14 of that Act as shewing the limit of liability recognised by the Legislature. The members are not liable on the ground of being partners; their liability rests on the contract they have entered into, which, in the case of advanced members, is to pay the amounts due on their mortgages: *Brownlie* v. *Russell* (2); *In re Sheffield and South Yorkshire Permanent Building Society* (3); *Buckle* v. *Lordonny* (4); *Re Britannia Permanent Benefit Building Society* (5); *Scottish Property Investment Company Building Society* v. *Boyd* (6); *In re London Marine Insurance Association* (7).

The class represented by the Applicants are admittedly members under rule 15, but there is nothing in the rules placing them under any liability beyond the amount of their shares, and rule 21 clearly shews that such a liability was not intended. Any outside person contracting with the society's officers is bound to inquire into the extent of their authority, because the society only carries on business for purposes defined by the Legislature, though borrowing is not necessarily *ultrà vires*. And depositors and other persons dealing with the society are affected with notice of its rules: *In re Victoria Permanent Benefit Building, Investment, and Freehold Land Society* (8); *Chapleo* v. *Brunswick Permanent Building Society* (9).

After an advanced member has become a withdrawing member —that is to say, has satisfied his liability *inter socios* and redeemed his mortgage—he is under no further liability, although there may be outside creditors: *Tosh* v. *North British Building Society* (10); *London Provident Building Society* v. *Morgan* (11); *Buckle* v. *Lordonny*; *In re Doncaster Permanent Building Society* (12); *In re West Riding of Yorkshire Permanent Benefit Building Society* (13); *In re Borough Commercial and Building Society* (14).

(1) 2nd Ed. pp. 145, *et seq.*
(2) 8 App. Cas. 235.
(3) 22 Q. B. D. 470.
(4) 56 L. J. (Ch.) 437.
(5) 65 L. T. (N.S.) 196.
(6) 12 Court Sess. Cas. 4th Series, 127.
(7) Law Rep. 8 Eq. 176.
(8) Law Rep. 9 Eq. 605.
(9) 6 Q. B. D. 696.
(10) 11 App. Cas. 489.
(11) [1893] 2 Q. B. 266.
(12) Law Rep. 4 Eq. 579.
(13) 45 Ch. D. 463.
(14) [1893] 2 Ch. 242.

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Although this society is being wound up as an unregistered company under Part VIII. of the *Companies Act*, 1862—in which sect. 200 is included—and although that section says that "every person shall be deemed to be a contributory who is liable, at law or in equity, to pay or contribute to the payment of any debt or liability of the company, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members amongst themselves, or to pay or contribute to the payment of the costs, charges, and expenses of winding up the company"—yet it is settled law that the unadvanced members are not liable to make payments to adjust the rights of members among themselves; and as regards the debts of the society, the advanced members are only liable to contribute in a sense—viz., to the extent of their mortgage debts: *Re Britannia Permanent Benefit Building Society* (1).

The words added to rule 17 in 1870 do not purport to make members personally liable for the money borrowed by the society from the depositors. A rule authorizing the directors of a society under 6 & 7 Will. 4, c. 32, to borrow sums at interest, is not necessarily invalid, though it would not be valid if it enabled the trustees or directors to pledge the credit of the individual members without limit, and beyond the value and amount of their shares and subscriptions: *Murray* v. *Scott* (2); *In re Mutual Aid Permanent Benefit Building Society* (3).

Even the indemnity to officers, under rule 31, is confined to the funds of the society. The only cases in which advanced members can be held liable to contribute to losses is where the rules expressly so provide: *In re West Riding of Yorkshire Permanent Benefit Building Society* (4); *Brownlie* v. *Russell* (5). The liability of the advanced members was admitted in *In re Doncaster Permanent Building Society* (6). If there is any liability, beyond the amount of the existing assets, it must fall on the unadvanced members. At any rate, the advanced members are entitled to redeem on paying the amounts due under their

(1) 65 L. T. (N.S.) 196.
(2) 9 App. Cas. 519, 538.
(3) 30 Ch. D. 434.
(4) 43 Ch. D. 407.
(5) 8 App. Cas. 235, 260.
(6) Law Rep. 3 Eq. 158.

mortgages, without providing for losses, even though they may hereafter be personally liable to contribute to such losses.

Haldane, Q.C., and *Macnaghten*, for the unadvanced members:—

Neither the advanced nor the unadvanced members are liable to the outside creditors: *Murray* v. *Scott* (1); *In re Doncaster Permanent Building Society* (2); and a rule providing that the members should be personally liable would be *ultrà vires*.

The question whether the depositors had notice of the rules or not is not of any importance, for they must have knowledge of the Act of Parliament.

If the depositors have only a charge, there is no liability on the society, and advanced members can redeem their mortgages without reference to the depositors' claims. If there are no outside creditors of the society, they can redeem without reference to losses: *Tosh* v. *North British Building Society* (3).

But if the society is liable to outside creditors, the liability to contribute affects both advanced and unadvanced members. They are both members of the society in respect of the shares, whether investing or advanced, which they hold, and both classes must contribute rateably towards paying the outside creditors: *In re West Riding of Yorkshire Permanent Benefit Building Society* (4); *Brownlie* v. *Russell* (5).

The Applicants confuse the right to redeem and the right to withdraw. The right of redemption depends on the terms of the mortgage, whereas the right of withdrawal depends on the rules.

If an advanced member has paid up everything due from him, so as to be in a position to redeem, he is in no better a position than one who has not paid up, for the latter can at any time pay up, and obtain his release under rule 21.

It depends on the contract between them and the society whether advanced members can get rid of their liabilities by withdrawal: *Tosh* v. *North British Building Society*; and it does not follow, because an advanced member is entitled to redeem, that he is not liable as a contributory.

(1) 9 App. Cas. 519, 546.
(2) Law Rep. 3 Eq. 158.
(3) 11 App. Cas. 489.
(4) 43 Ch. D. 407.
(5) 8 App. Cas. 235.

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Buckley, Q.C., and *Bramwell Davis*, for the liquidator and the depositors:—

Three questions have to be decided, viz.: (1.) Are the advanced members entitled to redeem on payment only of the amounts due under the rules? (2.) If they are so entitled, do they cease, on completing their payments, to be members of the society for all purposes? (3.) If they do not so cease to be members, are the investing members primarily liable, and the advanced members only secondarily liable, for losses?

An advanced member can only redeem on paying all sums due from him as a contributory, and, even after paying everything due from him under his mortgage and the rules, he remains liable, in a winding-up, as a contributory, for all the society's debts: *London Provident Building Society* v. *Morgan* (1); *Tosh* v. *North British Building Society* (2).

Inasmuch as the loans on deposit were made to the society, and not to its members, no question of indemnity under rule 17 arises. The liability of the society to repay the loans undoubtedly exists, and all the members, whether advanced or unadvanced, must contribute enough to pay it. Advanced members and investing members are equally members, although they take their benefits in different ways. This is shewn by rules 1 and 9, and rules 12 to 19. And the words "other payments" in rule 21, shew that an advanced member is liable to make other payments than those which become due for principal, interest, and fines. The rules do not provide that members shall cease to be such on making these payments. No limit on the liability of the members is imposed by the rules, and none is imposed by law: *In re Doncaster Permanent Building Society* (3). The liability depends on the contract with the society, and on the question whether, having regard to the authority given to the directors, the security given to the lenders is confined to the assets of the society. Even if an authority to the directors to pledge the individual credit of the members is not good so far as it purports to make them liable to be individually sued, it is good so far as it enables the assets of the society to be pledged,

(1) [1893] 2 Q. B. 266. (2) 11 App. Cas. 489.
(3) Law Rep. 3 Eq. 158.

and the members to be called on to make good a deficiency: *In re Mutual Aid Permanent Benefit Building Society* (1); *Murray* v. *Scott* (2).

The only limit on the borrowing is that which is imposed by the alteration in rule 17, viz., that it must be "for the purposes of the society."

If the depositors had only a first charge on the assets, the realization of this charge would exhaust the assets, and the members would in that case have to pay the ordinary debts.

Eve, for *Ann Girardet.*

1894. Feb. 14. WRIGHT, J.:—

The *West London and General Permanent Benefit Building Society* was formed in 1868 under the Act of 1836. It has not been registered under the Act of 1874. It is being wound up under the *Companies Act*, 1862. It owes about £1200 to ordinary creditors, and about £70,000 for money borrowed from outside lenders. It is estimated that after realization of all its assets and securities, there will be a deficiency of about £6000. The assets, therefore, are much more than sufficient to pay the ordinary creditors. The present application is made by advanced members, who claim in substance a right to redeem their mortgages upon payment of the amounts due or to become due in respect of principal and interest, and other similar matters, according to the society's rules and tables, without any further liability, either directly in respect of the society's debts, or for contribution to losses in aid of the unadvanced members. The liquidator and the loan creditors contend that all the members are liable to contribute in respect of all the debts of the society, and, further, that the advanced members cannot redeem without providing for this liability. The unadvanced members contend that if they are under any liability as contributories, the Applicants are under the same liability. It is, as I understand, desired that I should decide these questions without regard to the terms of the particular applications: and the loan creditors are now represented with

(1) 30 Ch. D. 434. (2) 9 App. Cas. 519.

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this object. The rules of the society provide for the management of its affairs by directors and paid agents and officers. Every member is to pay an entrance fee, and an annual sum for postage, &c., and is liable to fines in certain events. A member is entitled on the ordinary conditions to a share of the value of £50, that is to say, that sum he may receive at once as an "advanced member" on undertaking to pay for it by certain monthly contributions, and giving security for such payments by mortgage of property. (Such a member is not a mere borrower on security: *Brownlie* v. *Russell* (1).) Or he may prefer to acquire by small monthly payments, as an investing or "unadvanced member," the right to receive that sum at a future date, fixed by the tables in relation to the amounts of his payments. Only the unadvanced members share profits. There is no provision for making the advanced members liable to contribute to losses. Advanced members are entitled (rule 21) to redeem their mortgages "on payment of the total amount due to the society for principal interest, fines, and other payments." By rule 31 the trustees, directors, and officers of the society are to be indemnified "out of its funds and property" against all losses, costs, charges, damages, or expenses. By rule 17, which was added in 1870, it is provided as follows: [His Lordship read the second part of rule 17, and continued:—]

It is to be particularly observed that this rule does not in terms provide that the moneys are to be borrowed upon the security of the funds or assets of the society. Nor is there any stipulation of this kind in the deposit receipts which were given to lenders, and which appear to be the only records of the loan contracts, except the books of the society. These receipts are simple receipts for money to be placed to the deposit account of the lender, with a note as to the requisite length of notice for withdrawal. The forms of the mortgages taken from advanced members have not been uniform. Two have been selected for test cases. *Alsop's* mortgage, dated in 1877, is expressed to be "for securing the discharge of the" principal sum by the mortgagor, "and such sums as may become payable by him to the said society under or by virtue of these presents or the rules or

(1) 8 App. Cas. 235.

bye-laws of the said society, or in any other way," and it is not to be redeemable until the principal and any expenses properly incurred for the mortgagor by the society, and interest and fines "and all other moneys which are now or which at any time hereafter may become due to the said society from the mortgagor, in respect of any share or shares in the said society, shall have been duly paid." *Speller's* mortgage, dated in 1891, merely contains a covenant by the mortgagor to pay his instalments, "subscriptions, fines, and other sums of money payable according to the rules of the said society." Mrs. *Girardet's* mortgage is in this form. The first question to be determined in order to ascertain the rights of the parties is whether the members, advanced or unadvanced, of such a society can be called upon to contribute towards discharge of its ordinary debts (which are usually small, and in this case are about £1200) anything beyond such subscriptions or instalments and fines as remain unpaid on their shares or mortgages according to the society's tables and rules. In other words, must the ordinary creditors look to the assets of the society as the only fund out of which they can obtain payment, or can they, if that fund is insufficient, come upon the members personally? In the case of an unincorporated industrial society, which is much more like an ordinary trading partnership than building societies are, there seems to be no doubt that the members would be liable individually and without limit, although such liability could be enforced only by means of a judgment against the trustees or other persons prescribed for that purpose and *scire facias* against particular members: *Myers* v. *Rawson* (1); *Dean* v. *Mellard* (2). In a winding up also the liability would be unlimited, but would, of course, be enforced only on terms of equality so far as practicable. But building societies are not in the nature of partnerships, and there is no express decision in the case of a building society, unless *In re Doncaster Permanent Building Society* (3) can be considered to be a decision. There *Wood*, V.C., at Chambers, settled advanced members on the list of contributories and afterwards said: "There is no doubt that they

(1) 5 H. & N. 99; 29 L. J. (Ex.) 217.

(2) 15 C. B. (N.S.) 19; 32 L. J. (C.P.) 282.

(3) Law Rep. 3 Eq. 165, 170.

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were members for the purpose of paying debts, and therefore it was proper and right they should be made contributories." But the matter does not seem to have been discussed, because the creditors had been paid off; and as the Vice-Chancellor seems to have thought that the advanced members who had not withdrawn would, under the rules of that society, have been bound to contribute to the losses of the unadvanced—*i.e.*, to pay the debt of the society to them—it is not clear that the expression quoted refers to ordinary creditors at all. In *In re Professional, Commercial, and Industrial Benefit Building Society* (1) Lords Justices *James* and *Mellish* said that if the society were wound up, the advanced members would be contributories; but there is nothing to shew to what extent or for what purposes, or on what ground, and I cannot find anything in the case which supports the expression in the head-note about unlimited liability. In the absence of express decision, it would seem on principle that, the doctrine of partnership being inapplicable, the doctrine of principal and agent must be applicable in the case of ordinary debts properly incurred by the directors for the ordinary purposes of the society, and that if the assets (including the unmatured subscriptions of the unadvanced members and the unmatured instalments of the advanced members), are insufficient to pay such debts, all the persons who were members when such debts were incurred ought to be held liable for them on the principles of common law. And of this opinion Lord *Blackburn* seems to have been in *Murray* v. *Scott* (2). I need not read the particular passages to which I refer, but they commence with the words, "In order to apply," at page 546 of the report in the Law Reports, and end with the words, "construction of the rule," on page 548. I come, therefore, to the conclusion that if there were no creditors except ordinary creditors, and the assets were insufficient, the members would be personally liable, and are therefore to be settled on the list of contributories. There cannot be any difference for this purpose between advanced and unadvanced members. The liability depends, not on the terms of contract of the members *inter se*, but on the fact of all members being principals, and of the directors being their agents in relation to the necessary

(1) Law Rep. 6 Ch. 856. (2) 9 App. Cas. 519, 546-8, 554.

business of the society. The hardship is very small, because there seems to be no ground of objection to registration under the Act of 1874 for the mere purpose of liquidation, and limitation of liability would then follow even as regards liabilities previously incurred: *Fountain's Case* (1). The second question is, What are the liabilities of the members in respect of the moneys borrowed under rule 17? Here, again, *Murray* v. *Scott* (2) is the only important case. There the decision was that the mere fact that the rule in that case placed no limit on the extent of the borrowing power did not *per se* make it *ultrà vires*. But all the Law Lords seem to me to have intimated, not obscurely, the opinion that, if a rule giving power to borrow had to be construed as giving power to bind the members personally for borrowed money, and not as binding merely the assets of the society, it would be *ultrà vires*, as turning the obligations of the members into something inconsistent with the purpose of such societies. Their business does not necessarily require borrowing at all, and it is only for necessary purposes of their business that any authority to bind the members individually can be implied or is consistent with the nature and objects of such societies. A rule which should go beyond this would, therefore, be *ultrà vires* to that extent. The security of lenders, Lord *Selborne* says (3), is "necessarily the total amount of the contributions of members, and the creditors can have no recourse except against such funds and property." It is true that no one of the Law Lords who took part in the decision of *Murray* v. *Scott* purports to decide this. It is true also that the rules and mortgages in that case contained expressions which, more clearly than anything in the present case, indicated an intention to charge only the assets of the society; but I think that the language used by all of them shews that they would have been prepared to take this view in cases much less distinct in definition of the funds to be charged than in that case. I therefore think that the members, advanced or unadvanced, cannot be held personally liable in respect of these loans beyond the amounts payable under the terms of the rules and tables. And this is really the substantial question in this case.

(1) 34 L. J. (Ch.) 593. (2) 9 App. Cas. 519. (3) 9 App. Cas. 539.

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The third question which I have to decide (nominally the only one) is whether the advanced members are entitled to redeem their mortgages without providing for the liabilities to ordinary or loan creditors, in so far as such liabilities may be found to exist—that is to say, in this case, the liability in respect of ordinary creditors. It is not very material if I am right on the main questions, because the Applicants must pay either as mortgagors or as contributories. I think, though with much doubt, that they are not, under either form of mortgage. The decision of Mr. Justice *Chitty* in *In re West Riding of Yorkshire Permanent Benefit Building Society* (1) seems to me to govern this. It is true that in that case the rules themselves expressly provided for contribution by the advanced members to losses. In the present case the mortgages by themselves do not subject the mortgagors to any liability beyond that to which they are subject as members under the rules and tables; but I think they are bound by the terms of the mortgages and rule 21, taken together, as a condition of redemption, to satisfy every liability to which they are subject to the society or its liquidator as members, whether by express provision made in the rules, or by implication from the fact of membership under rules of this kind. One ground of doubt, to my mind, is that possibly the obligation to provide for ordinary creditors is satisfied when it appears that there are assets enough to pay them, and are made insufficient only because the borrowed moneys have also to be paid. But on the whole I think the members cannot set this up. They authorized the borrowing, with the necessary consequence that the loans have to be paid out of the assets; and to the extent to which the assets are so made insufficient to pay ordinary debts—that is to say, in this case about 8 or 9 per cent.—the obligation to pay them is not satisfied by reason of the members' own act in authorizing the borrowing. There is a fourth question, which does not properly arise on this application, but on which I understand the parties desire an expression of opinion. That is the question as to the order in which the claims of the several classes of creditors are to be met out of the assets or by the several classes of contributories. The costs of the winding-up ought, I suppose, to be

(1) 43 Ch. D. 407.

first paid out of the assets, and, as the present applications are test cases, the costs of them on both sides ought to be treated as costs in the winding-up; but this does not apply to Mrs. *Girardet's* claim. She was sufficiently represented by *Speller*, and I do not allow her costs. Against the remaining assets both the ordinary creditors and the loan creditors ought to rank *pari passu*, there being no consent, as in *Murray* v. *Scott* (1), to prefer the ordinary creditors, and the assets having been swollen by the loan deposits. Any deficiency due to the ordinary creditors ought to be made up by contributions from all members, advanced or unadvanced. As I understand the figures, this contribution will be small—probably about £5 a share. The advanced members are not liable to make any further contribution to the losses of the unadvanced, in the absence of any contract by the rules or otherwise to that effect. The advanced members are therefore entitled to redeem on payment according to the rules and tables, and of that amount which I have suggested as £5 per share, but the exact measure of which must be matter of inquiry if no agreement can be made.

1894. March 12. The summonses were restored to his Lordship's list for further argument, as to how the costs of realization and winding-up should respectively be borne.

Grosvenor Woods, Q.C., and *Warrington*, for the advanced members:—

The advanced members are not liable to contribute to any costs. The only direction so far given is that the costs of the winding-up are to come out of the assets. The *onus* lies on the liquidator to shew that the assets include contributions to be made by advanced members for the purpose of paying costs.

Buckley, Q.C., and *Bramwell Davis*, for the liquidator and the depositors:—

Different considerations as to how costs are to be paid apply where there are two classes of creditors.

Sect. 38 of the *Companies Act*, 1862, provides that where a

(1) 9 App. Cas. 519.

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"company formed under this Act" is wound up, the members shall be liable "to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding-up." And sect. 102 says that the Court may, at any time after the winding-up order, "and either before or after it has ascertained the sufficiency of the assets of the company, make calls on and order payment thereof" by the contributories "to the extent of their liability, for payment of all or any sums it deems necessary to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of winding it up."

The costs of realizing must be treated as part of the costs of the winding-up, and must be borne entirely by the members: *In re Professional Life Assurance Company* (1). No part of the limited fund applicable to the depositors' claims is to be saddled either with the costs of making calls, or with the general costs of the winding-up: *In re Agriculturist Cattle Insurance Company* (2). In short, the members must pay all the costs of the liquidation, although they have paid up the full amount of their shares: *In re Accidental Death Insurance Company* (3).

[WRIGHT, J.:—There is nothing specific in the last two cases about the costs of realization.]

Haldane, Q.C., and *Macnaghten*, for the unadvanced members:—

Only the amount which remains after deducting the costs of realization is to be regarded as assets: *In re State Fire Insurance Company* (4).

It cannot be contended that the unadvanced members are not under any liability for the general costs of the winding-up. But they are under no greater liability than the advanced members, for they are not bound, by the rules, to pay up the whole nominal amount of their shares. They are not like shareholders under the *Companies Acts*.

Grosvenor Woods, Q.C., and *Warrington*, for the advanced members:—

The Court has held that the advanced members may redeem

(1) Law Rep 3 Eq. 668; 3 Ch. 167.
(2) Law Rep. 10 Ch. 1.
(3) 7 Ch. D. 568.
(4) 34 L. J. (Ch.) 436.

on paying certain sums due on their mortgages and a proportion of what is due to the outside creditors, but that they are under no liability to the depositors, who must rely on the assets. But for the depositors there would have been no winding-up, and in the winding-up the question of the liability of the advanced members to the depositors has been decided in favour of the depositor.

[WRIGHT, J.:—The same thing might have been said in the cases as to insurance companies which have just been cited.]

Those cases are distinguishable on the ground that the rights of the policy-holders depended on contracts under which they were entitled to have the funds kept intact.

Sect. 38 of the *Companies Act*, 1862, has no application, for it only relates to companies formed under that Act, and sect. 200, which applies to unregistered companies, only contemplates a contribution in respect of "the costs, charges, and expenses of winding-up," which are to come out of the assets. The advanced members are not liable for costs as partners, and there would be no injustice in holding they were not liable to any costs; for if they were so liable, they could never ascertain what they were bound to pay, and could never redeem their mortgages. The costs of liquidation cannot be ascertained till the assets are got in. Assuming the advanced members are liable for costs as contributories, they are not liable for them under their mortgages; the extreme inconvenience which would result from importing the costs of liquidation into the accounts between a mortgagor and the society is obvious. At the outside, they are only liable as members *pro ratâ*, according to their shareholding.

Buckley, in reply:—

The liquidator should be ordered to make a call to raise the estimated amount of the costs.

1894. March 16. WRIGHT, J.:—

I think that the proper declaration on the points reserved as to costs is, that the actual costs of realization must be paid out of the assets of the society, other than assets arising from the

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contributions or calls payable under this order; and the costs of winding-up must be paid by the members, advanced and unadvanced.

The liquidator is to make an estimate of what call on the members, advanced and unadvanced, in proportion to their shares, will meet the costs of winding-up.

The members are respectively to be permitted to redeem on payment of the amounts due to the society, according to the society's rules and tables and to the terms of their respective mortgages, and on payment of the contributions for which they are by this order declared liable, and on payment of the amount of the call upon them hereby ordered. This declaration, as regards costs of winding-up, applies to both forms of mortgages—to *Alsop's* form, by the very terms of the mortgage; to *Speller's* form, by virtue of rule 21.

Solicitors: *Grundy, Izod, & Grundy; Riddell, Vaizey, & Smith; Collyer-Bristow & Co.; T. R. Watson.*

F. E.

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Restraint of Trade—Covenant—Breach—Agreement by Vendor of Business not to "carry on or be in anywise interested in" any similar Business—Goodwill—Business carried on by Vendor's Wife trading separately—Separate Estate—Injunction.

The Defendant, who had been carrying on the business of a grocer under the style of "*T. P. Hancock*," sold the business to the Plaintiff, and entered into an agreement not to "carry on or be in anywise interested in" any similar business within a specified area. About seven years later the wife of the Defendant, desiring (against his wishes) to start her nephew in business, opened a grocer's shop within the specified area, and carried on business there under the style of "Mrs. *T. P. Hancock*." The business was managed by the nephew, and the Defendant's wife took some part in carrying it on; but the Defendant took no part. The money necessary for starting the business was found by the wife out of her separate estate, and no money whatever was contributed by the Defendant, either towards starting the business or carrying it on, nor did he share in the profits in any way. He, however, introduced his wife to his bankers, where she opened an account in her own name, assisted her in obtaining the lease of the shop in her own name, introduced the nephew to the wholesale merchants who had supplied the old business, and, as his wife was disabled by rheumatism from writing, wrote for her a circular inviting "old friends" to come to the shop. He also handed copies of the circular to some few persons, including a tenant of his own:—

Held, by the Court of Appeal (*Lindley*, *Kay*, and *A. L. Smith*, L.JJ.), *Kay*, L.J., dissenting, that there had been no breach of the agreement by the Defendant.

Appeal from *Kekewich*, J., dismissed, but without costs.

APPEAL from Mr. Justice *Kekewich* (1).

The Defendant, *Thomas Prosperous Hancock*, for many years carried on business as a grocer, provision dealer, and baker at *Kidsgrove*, in the county of *Stafford*, a town of between three and four thousand inhabitants. He had two shops, one in *Heathcote Street*, and the other in *Market Street*. The name over the shop in *Heathcote Street* was "*T. P. Hancock*." His wife *Agnes* assisted him in the business, and also a lad named *John Kerr*, who was a nephew of the wife. The Defendant had no children.

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In 1886, wishing to retire from business, the Defendant sold the shop in *Heathcote Street*, with some adjoining land, and "the goodwill of the business connected with the said premises," to the Plaintiff for £2000; and by a written agreement, dated the 31st of March, 1886, the Defendant, the vendor, undertook "not to carry on or be in anywise interested in the businesses of a wholesale or retail grocer and provision dealer and baker, or any of them, within a distance of five miles from the said premises, measured by the nearest cart-road, during the period of ten years, to be computed from the 11th day of November next," until which day the vendor was to be at liberty to carry on the business.

After the execution of this agreement the Defendant sold his other shop and gave up business altogether, being a man of independent means. At the end of 1891 or the beginning of 1892 his wife, being desirous of helping her nephew, *Kerr*, asked the Defendant to assist her in setting up a grocer's business in *Kidsgrove*. To this, it appeared, he at first objected, but ultimately he repaid to his wife a sum of £110 she had given him to invest, being savings which he had permitted her to make out of the weekly housekeeping moneys he had allowed her; and with this money and £90 which she had in cash she, in March, 1893, took and stocked a small shop in *Market Street* within 200 yards from the shop in *Heathcote Street* which the Defendant had sold to the Plaintiff, and painted up over it "Mrs. *T. P. Hancock*." There her nephew, *Kerr*, with her assistance, carried on the business of a grocer, provision dealer, and baker. The Defendant and his wife lived together at another house, *Kerr* residing with them. The business was conducted chiefly by *Kerr*, who received all moneys in connection with the business, he paying or accounting for them to Mrs. *Hancock*. For his services he received a small weekly sum and also a small share of the profits—which at present were trifling—after deducting 10s. a week for his board. Mrs. *Hancock* took some part in the business, going to the shop generally two days a week. All goods were ordered and paid for in her name, by cheques drawn by *Kerr* on her banking account, which she opened and kept in the name of *Agnes Hancock*, the cheques

being signed "*Agnes Hancock*, p.p. *John Kerr*." The lease of the shop was also taken in her name.

As Mrs. *Hancock* was not able at the time to write by reason of rheumatism in her right hand, the Defendant himself wrote out a circular which was to be issued when the new business was opened. Copies of this circular were printed for distribution, and it was (so far as is material) thus worded:—

"New Grocery and Provision Establishment,
Market Street, Kidsgrove.

Mrs. *T. P. HANCOCK*
has opened the above shop
with a new and well-selected stock of
Groceries and Provisions
and will be pleased to see all Old and New Friends.

Mrs. *T. P. H.* intends selling at prices that cannot be
beaten in or out of the Potteries."

Then followed a list of teas, including—

"Mrs. *Hancock's* well-known Mixture, 2/- lb., 6*d.* qr."

Then, after some further announcements, the circular concluded thus:—

"Note the Address—
"Mrs. *T. P. HANCOCK, Market Street, Kidsgrove.*
(Opposite *Dickinson's*, Draper)."

The tea referred to in the circular as "Mrs. *Hancock's* Mixture" was a tea formerly sold at the Defendant's shop under that name.

The Defendant distributed copies of the circular among a few of his old friends and customers, including a tenant of his, and he himself took *Kerr* to *Liverpool* and *Manchester* and introduced him there to four wholesale dealers who had supplied him, the Defendant, in his former business, and he induced them to supply the new business in the same way. He also negotiated the lease of the new shop to Mrs. *Hancock*, the lease being taken in her name, introduced her and *Kerr* to the solicitors who drew the lease, and also introduced her to his bankers, with whom she

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then opened an account in her own name, and into this account the receipts of the business were paid. He did not otherwise concern himself in any way in the business, nor render any services in, or contribute any money to, the management of it.

On the 8th of May, 1893, the Plaintiff brought this action for an injunction and damages, on the ground that the Defendant had, in substance, committed a breach of the agreement of the 31st of March, 1886.

At the trial, Mr. Justice *Kekewich* held (1), that the Defendant had not committed a breach of the agreement, and dismissed the action, with costs.

The Plaintiff appealed.

The appeal was heard on the 19th of March and the 9th of April.

Warmington, Q.C., and *A. D. Tyssen*, for the Plaintiff, Appellant:—

Mrs. *Hancock* is carrying on this business herself with money which is her separate estate. She should therefore carry it on only in her own name, "*Agnes Hancock*," and not, as she is doing, under her husband's initials, "*T. P. Hancock*," thus getting part of the goodwill of the old business. As to the meaning of the covenant, it is obvious that a husband living with his wife is "interested in" a business carried on by her; but the evidence is sufficient to shew that the Defendant has in fact "interested" himself in the new business, by taking an active part in promoting it, as in *Newling* v. *Dobell* (2); and thus he has brought himself within the covenant. "Interested in" is not necessarily confined to receiving money out of the business either in the shape of profits or salary; it means that the Defendant is not to assist in carrying on the business in any way whatever. In preparing and helping to distribute the circular soliciting the old customers, the Defendant was clearly assisting in carrying on the business, and so "interesting" himself in it. Again, "carrying on" is not confined to carrying on by himself as principal. The letter and spirit of a covenant of this kind must be regarded. Here is the case of a person assisting another to obtain the benefit of a goodwill which the former has himself

(1) [1894] 1 Ch. 209. (2) 38 L. J. (Ch.) 111.

sold. Apart from the relation of husband and wife, supposing the Defendant had acted in the same way on behalf of a stranger, could there be any doubt that he would be held to have been "interested in" the business carried on by that stranger? "Interested in" includes "busying himself about" or "having something to do with" another business. The words "in anywise interested in" are meant to cover every possible kind of competition. As to the authorities bearing on the subject, if *Clarke* v. *Watkins* (1), which was decided in 1863, had come before the Court of Appeal at the present day, the result would have been different. In *Jones* v. *Heavens* (2) and *Baxter* v. *Lewis* (3) injunctions were granted, though no doubt the words of the covenants differed from those in the present case.

Renshaw, Q.C., and *Brinton*, for the Defendant, Respondent:—

The result of the authorities is, that a covenant of this kind must be construed strictly, and in favour of the covenantor. The present covenant is not in the ordinary stringent form, for it does not contain the words "concerned or engaged in." This new business is being carried on by Mrs. *Hancock* separately from her husband, partly with her earnings, which are, by the *Married Women's Property Act*, 1870, her separate property, and partly with money given to her by her husband, and which is also her separate property: *Ex parte Whitehead* (4). Since that Act it is clear that a married woman may carry on business separately from her husband; and she cannot be stopped from doing so merely because her husband may have covenanted for himself not to carry on such a business. "Carrying on" a business means carrying it on as owner: *Allen* v. *Taylor* (5)—a case which illustrates the rule that the Court will not extend the operation of a covenant of this kind beyond the actual words used.

Then as to "interested in." A man cannot be said to be "interested in" a business unless he derives some benefit from it. In *Bird* v. *Lake* (6) it was held that a covenant not to

(1) 11 W. R. 319.
(2) 4 Ch. D. 636.
(3) 30 Sol. J. 705, 754.
(4) 14 Q. B. D. 419.
(5) 19 W. R. 35.
(6) 1 H. & M. 111, 338, 340.

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"carry on or be engaged in" a particular business did not prohibit the covenantor from lending money to a person engaged in such a business, although he knew there was no means of repaying the money except out of the profits of the business.

[KAY, L.J.:—The object of this covenant is to prevent the person who bought the business from being interfered with. I do not remember this device ever having been adopted before.

LINDLEY, L.J.:—Though the Defendant does not carry on the business himself, he lets his wife do so, and does not stop her.]

Upon the evidence, there is no sham or fraudulent design on the part of the Defendant, and therefore we are entitled to rely upon the express words of the covenant. "Carry on" means as owner, and "interested in" means as co-owner, or as a person receiving a salary out of the profits, or receiving such a share of the profits as is sufficient to confer upon him an interest in the business; it does not mean "interesting himself in." "In anywise" means "in any way"—that is to say, the covenantor must have some interest which confers a benefit. The test is, Is there any legal obligation on the wife's part to pay any of the profits of the business to the husband? There is clearly none; the profits being earned by the wife out of her separate estate. As to the circular, it is now settled that the vendor of the goodwill of a business, in the absence of express stipulation to the contrary, may not only carry on a similar business but solicit customers of his former business, provided he does not represent himself as carrying on the old business, or as being the successor of the person by whom it was carried on: *Pearson* v. *Pearson* (1), overruling *Labouchere* v. *Dawson* (2).

Warmington, in reply:—

Mrs. *Hancock's* marriage did not confer upon her any legal right to use her husband's christian names, and her husband could have prevented her from so doing. From her use of his initials, "*T. P.*," the public would conclude she was carrying on the old business. As to the form of the covenant, it must be so

(1) 27 Ch. D. 145. (2) Law Rep. 13 Eq. 322.

construed as to effect what the parties had in view, namely, to protect the goodwill which was being sold. The husband could not have taken more serious steps towards establishing the new business than he did by introducing his wife to his bankers, assisting her in obtaining the lease, introducing *Kerr* to the wholesale dealers who supplied the old business, negotiating the lease, and drawing up and distributing the circular soliciting the old customers.

The case is covered by the words "in anywise." A husband living with a wife who is engaged in business is "interested in" the business—that is, in its success. He is therefore interested in it in "somewise."

1894. April 23. LINDLEY, L.J.:—

This is an appeal from an order of Mr. Justice *Kekewich*, refusing an injunction to restrain the Defendant from breaking an agreement, into which he entered with the Plaintiff on the occasion of the sale to him of a business formerly carried on by the Defendant. The Defendant formerly carried on business as a grocer, provision dealer, and baker under the name of *T. P. Hancock*, in *Kidsgrove, Staffordshire*. His wife *Agnes* assisted him in his business, as did also a nephew of hers named *John Kerr*. In March, 1886, the Defendant sold this business to the Plaintiff, and agreed "not to carry on or be in anywise interested in the businesses of a wholesale or retail grocer and provision dealer and baker, or any of them," within a distance of five miles from the old shop, for a period of ten years. This agreement, it will be observed, is personal to the Defendant; it binds him and him only; it does not extend to any one else, or make him answerable for the conduct of any one but himself. In the next place, his obligation is confined to abstaining from two lines of conduct, viz. (1.) carrying on any of the businesses specified, and (2.) being in anywise interested in any of such businesses.

The agreement, like every other agreement, must be construed with reference to the subject-matter to which it relates, and so as to give effect to, and not to defeat, the object to attain which the agreement was entered into. This object is plain enough: it was to secure the Plaintiff from the competition of the Defendant.

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But, although this is the object, it is not in accordance with sound legal principle to give to the language of the agreement a wider interpretation than that language properly bears. The duty of the Court is confined to enforcing the agreement entered into, and it is not permissible to extend it so as to make the Defendant responsible either for the conduct of other people besides himself or for conduct which does not amount to carrying on or being in any way interested in one of the prohibited businesses. These principles are elementary, and their application to such cases as the present is well exemplified by the case of *Bird* v. *Lake* (1).

I pass on to consider what the Defendant has done, and what others have done, for which it is sought to make him responsible. The Defendant himself *bonâ fide* retired from business, and he has not himself made any attempt whatever to carry on business, nor does he carry on any business himself, nor has he attempted to acquire, nor has he in fact any interest whatever in, any business. The learned Judge who saw the witnesses came to this conclusion, and I not only see no reason to differ from him, but I am satisfied that the evidence warrants the conclusion arrived at. What has been done is this. Some six or seven years after the sale of the business the Defendant's wife set to work to start her nephew *John Kerr* in business. She had some £200 of her own. The evidence on this point satisfied the learned Judge that she had separate estate to this amount, and again I agree in his conclusion. She took a grocer's shop near the Plaintiff's. She painted up "Mrs. *T. P. Hancock*," and her nephew *Kerr* has carried on business there since with her help and under her name. She lives with her husband (the Defendant) at another house, but she goes every now and then to the shop, and is generally there two days a week. The Defendant certainly assisted her and *Kerr* to start this shop, although at first he objected to the scheme. But he helped his wife to get a lease of the shop; he introduced her to a local bank, where she opened an account in her own name; and he introduced *Kerr* to wholesale suppliers of grocery and other goods, and so induced them to give him credit. The Defendant further assisted in the

(1) 1 H. & M. 111, 338.

preparation of a circular, inviting old friends and customers to deal at the shop; and "Mrs. *Hancock's* mixture," which was some tea which he used to sell when he was in business, was prominently referred to in the circular. Further, he gave this circular to two or three old friends and customers. The Defendant, however, has no pecuniary interest in the business; he is not liable for the debts contracted by his wife or by *Kerr* in carrying on the business; and the profits, if any, cannot be claimed by the Defendant. All moneys received and paid in respect of the business pass through his wife's account at the bank, and on this account the Defendant has no power to draw. The wife pays *Kerr* a salary, and, as I gather, a share of the profits.

Now, it cannot be denied that this proceeding is calculated to injure the Plaintiff, and no one can be surprised at his being greatly annoyed by it. If the evidence admitted of the conclusion that what was being done was a mere cloak or sham, and that in truth the business was being carried on by the wife and *Kerr* for the Defendant, or by the Defendant through his wife for *Kerr*, I certainly should not hesitate to draw that conclusion, and to grant the Plaintiff relief accordingly. But I find it impossible to avoid the conclusion that the business is being carried on by the wife primarily for *Kerr*, and, perhaps, to some extent, for herself; but, there being at present little or no profit, she has not yet got any money out of the business for herself.

This being the state of the case, I am unable to hold that the Defendant has done, or is doing, or is threatening or intending to do, what he agreed not to do. The utmost that can be said is that he has assisted his wife and *Kerr* to do what he agreed not to do himself. No honourable man would have done that, and no honourable man would, if he could help it, allow his wife to do what she has done and is doing. But, as a matter of law, I cannot say that the Defendant is breaking his agreement. In *Bird* v. *Lake* (1) it was held that to help a man to carry on business by lending him money without security was not a breach of a covenant "not to carry on or be engaged in the business or any matter or thing whatsover in anywise relating thereto." So here, to help *Kerr* to carry on business

(1) 1 H. & M. 111, 338.

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by introducing him to persons who would furnish him with goods on credit, and by further assisting him through Mrs. *Hancock*, cannot, without straining the words of the Defendant's agreement, be held to be a breach of that agreement. A married woman with separate estate has a right to carry on business in her own name—*i.e.*, in the name of her husband, with the prefix "Mrs.," and I am not aware that he can prevent her from so doing by any legal proceedings. Even if he can, he is under no legal obligation to do so, unless he has imposed such obligation on himself by some contract. An agreement by a husband not to do a thing does not oblige him to prevent his wife from doing that same thing if she has a right to do it independently of him. Whether the Defendant in this case could or could not prevent his wife from assisting her nephew *Kerr*, I do not know. The Defendant does not say that he has endeavoured to do so and has failed. But, supposing he could do so, he has not agreed to do so, nor to try to do so, and the Court cannot itself impose any such obligation upon him.

It is urged that, even if the Defendant is not carrying on the business, he is in some way "interested" in it, that he is interesting himself in it, and that he can be restrained, and ought to be restrained, from so doing. As the Defendant and his wife are living together, I have no doubt that he is interested in her, and perhaps also in her nephew *Kerr*. Further, if the wife gets any profit out of the business she may very likely make use of it in adding to her husband's comforts. But I cannot say that he is in any way "interested" in the business which she has started and is carrying on for *Kerr*. What interest has he in that business? Certainly no pecuniary interest. His only interest is that indirect interest which every man has in the happiness and welfare of his wife. But to have such an interest as this is no breach of the Defendant's agreement. When a person sells a business and agrees not to carry on, or be in any way interested in, any similar business, the word "interested" is used to prevent him, not only from carrying it on, but also from having any proprietary or pecuniary interest in it. An injunction to restrain the Defendant from carrying on, or being in any way interested

in, the business, would not be broken if the Defendant were to repeat what he has done for *Kerr*, and is doing, by living with his wife without trying to stop what she is doing. I have reluctantly come to the conclusion that the Plaintiff is not entitled to an injunction in this case, and his appeal must be dismissed, but, under the circumstances, not with costs.

This case is one of general importance. Conveyancers will have to exercise their ingenuity in devising some method of stopping a wife with separate estate from carrying on a business in rivalry with a purchaser of a similar business from her husband. The agreement entered into in this case, to which the wife is not a party, does not cover such conduct, nor do the common forms at present in use. The old doctrine that the husband and wife are one person is inapplicable; they are not one with reference to her separate estate; his obligations are not hers, nor are hers his.

KAY, L.J. (after reading the agreement entered into by the Defendant, continued):—

The object of this agreement was obviously to secure to the purchaser the goodwill free from interference by the vendor. For this purpose the vendor agreed not to carry on or be in anywise interested in a similar business. If he did, he would attract some of the old customers, and draw them away from the purchaser. It seems to me clear that it is not confined to a pecuniary interest. If he carried on, or was in anywise interested in, a like business which drew away the old customers from the purchaser or otherwise diminished his receipts, though he took no pecuniary benefit from that business, the injury to the purchaser would be the same. Then "carry on" does not mean "exclusively" carry on, or even "principally." If he became partner with other persons, even a dormant partner, or if he contributed capital to aid a like business, or became manager, I should think he would have broken this agreement. So any active assistance in the business, particularly any such as was intended and calculated to attract his former customers and to take them away from the purchaser, would, in my opinion, be a "carrying on" within the meaning of those words as used in

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this agreement. I am also of opinion that being "interested in" means something short of "carrying on," and, when coupled with the words "in anywise," a very large meaning should be given to those words in furtherance of what seems to me the obvious intention.

The Defendant for some years observed this agreement. He sold his other shop, and gave up business altogether. [His Lordship then stated the circumstances under which Mrs. *Hancock* set up the business complained of, expressing his concurrence with the finding of Mr. Justice *Kekewich* that the business was her separate business, and that the money employed in it was her separate property. Then, after observing that the Defendant had drawn up the circular with his own hands, had himself distributed copies of it, had introduced *Kerr* to wholesale dealers, had negotiated the lease of the new shop, introducing his wife and *Kerr* to the solicitors who prepared it, and had also introduced his wife to the bank, his Lordship continued:—]

Suppose that the Defendant should in future repeat these and similar acts, could it be said that he was not "carrying on" or was not "in anywise interested in" this business? In my opinion it could not. I think that what he has done has been a breach of the agreement in both its branches. He has been assisting in carrying on this business, and it seems to me impossible to say that he is not "in anywise interested in" it. It is not necessary, but I do not think it would be improper, to construe the words "in anywise interested" as meaning, shall not in anywise actively interest himself in the business so as to interfere with the goodwill which he had sold.

What the Defendant has done seems to me to be a deliberate attempt to defraud the Plaintiff by getting back some of the goodwill which the Defendant sold to him. It is a principle of English law that a vendor shall not, after the sale, derogate from his own grant. For example, if a man sells a house with windows in it looking over his adjoining land he cannot afterwards build upon that adjoining land so as to obscure such windows. *Palmer* v. *Fletcher* (1), which is one of the leading authorities on that law, was decided in the King's Bench in

(1) 1 Lev. 122.

1662, 230 years ago. It was formally approved by Lord *Holt* in *Tenant* v. *Goldwin* (1), and is constantly cited at this day as undoubted law. If a man sells the goodwill of a business I have never been able to understand why the same principle should not apply. It is an anomaly by no means creditable to the law that there is an exception to the rule in that case, and it is therefore necessary to obtain an express contract from the vendor not to carry on a like trade. But, when there is such a contract, I am inclined to construe it, as much as can fairly be done, in favour of the intention, to prevent any derogation from the value of the thing sold. I think that an injunction ought to be granted against the Defendant in the words of the agreement which I have read, to restrain him, his servants, and agents from carrying on or being in anywise interested in the business set up in the name of his wife, or any similar business during the ten years mentioned in the agreement, within five miles from the premises in *Heathcote Street*, and that the Defendant should be ordered to pay the costs here and below.

A. L. SMITH, L.J. (after stating the facts, continued):—

That the object of the wife in opening the business for the nephew at the place in question was to obtain as much as she could of the goodwill of the old business for which her husband had received the £2000 is to me apparent. The circular which was issued, and the placing-up of "Mrs. *T. P. Hancock*" upon the fascia of the shop, coupled with the other circumstances of the case, make this obvious; and that her conduct is reprehensible is beyond dispute, as also that of her husband, for reasons I will hereafter state.

It is true that this case may be opened in such a way as to lead to the inference that the whole thing was a sham concocted by the husband and wife in order to evade his covenant; and indeed Mr. *Warmington* so opened this appeal; but, having heard Mr. *Renshaw* and Mr. *Brinton* on the Defendant's behalf, and having re-read the evidence since the argument was closed, I have arrived at the conclusion that Mr. Justice *Kekewich* was right in the decision at which he arrived, when he held that the

(1) 2 Ld. Raym. 1093.

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business was really that of the wife and not that of the husband, and that there was no attempted deception in the matter.

Before the passing of the *Married Women's Property Acts* of 1870 and 1882 I do not doubt that a wife, setting up business in the way Mrs. *Hancock* has, would have done so as agent for her husband; for as long as coverture existed she could do so in no other capacity, and her acts would then constitute a breach of covenant by the husband, on the principle *Qui facit per alium facit per se*. But this is not so now. The wife, although coverture exists, can nevertheless trade with her own separate property, apart from her husband and free from his control, as if she were a *feme sole*, as and when she pleases; and, if she does so, she is no more the agent for her husband than his father, uncle, or brother would be under like circumstances, nor can the husband restrain his wife from so acting. It is true that the proposition sounds novel, but, when looked into, the above is the real position of a wife in relation to her husband at the present time in the circumstances of this case. If, therefore, it is desired to restrain such an act of a wife, the covenant of the husband must hereafter be so framed as to meet the case; for it is no part of the duty of the Court to place a forced construction upon the covenant, which it will not fairly bear, in order to put a stop to that of which it disapproves.

When the agreement in this case was framed, the capacity of the wife to do what she has done was not contemplated by the parties, for, if so, the covenant would obviously have been different. Mr. *Warmington*, in an excellent argument, contended that the guiding rule was that we should construe a covenant like the present so as to carry out the objects and intention of the parties; and in this I agree, if he had limited his proposition, which he did not, by the words "so far as the language of the covenant will fairly allow, and no further." Now, the covenant is that the covenantor will not carry on, nor in any way be interested in, a business of a character similar to that sold, within the prescribed limits of time and space; which, in my judgment, means that he will not carry on, by himself or his agent, such a business, nor will he in anywise have any interest, be it pecuniary or personal, in such a business. It is not a

covenant that he will not take an interest, whether from feelings of affection or friendship or what not, in how another may carry on his or her business within the prescribed limits. The words are, "or be in anywise interested in" the businesses. To constitute a breach of the covenant it must be proved that the covenantor has some interest in the business itself which is being carried on, and not that he only takes, or has taken, an interest in the success of another carrying on his or her business. In my opinion, this is the true reading of the covenant.

If this case had rested here, for the reasons above stated I should hold that the fact that the Defendant's wife was carrying on a business as a *feme sole*, with her separate property on her own behalf, within the prescribed limits, did not establish a breach of covenant by the Defendant. The husband takes no part whatever in the management of the business, and has advanced no money in that behalf. But it was said, and with truth—and this is an important part of the case—that the Defendant, before the business was started, did not attempt to restrain his wife from carrying it on, but actually aided and abetted her in so doing, by introducing her to his bankers, by going with her nephew to the old wholesale dealers with the old firm in *Manchester*, and introducing him to them, and by taking part in the penning of the circular which, it appears, was issued after the business was started, and in taking part in the issuing of it. I agree that this is evidence which might well lead to the inference that the business was in reality his, and not his wife's, or partly his and partly hers, which would suffice to constitute a breach of covenant by the husband, for he would then have an interest in the business. But, when this inference is disproved, as, in my judgment, it is in this case, how do the acts of the husband constitute a breach of the agreement sued on? He has no interest whatever in the business itself, which is that of his wife, carried on by her for her own purposes, though he has taken an interest in her succeeding therein, which these acts of his shew that he has done. If the husband had performed similar acts in like circumstances for a stranger who was setting up business on his own account, in my judgment it could not be said that he was in anywise interested in the business, though he had interested

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himself on behalf of the stranger; and so now the same result follows if he does the same acts for his wife. I agree that his conduct is such as to be highly disapproved of; but that does not constitute a breach of the agreement sued on. This agreement of the 31st of March, 1886, does not cover the present case, and I cannot, though I should like to do so, hold that the husband has broken his agreement.

I agree with Mr. Justice *Kekewich*, and, consequently, I think that this appeal must be dismissed.

Solicitors: *Cronin, Orgill, & Cronin*, agents for *Llewellyn & Ackrill, Tunstall; Chester & Co.*, agents for *E. A. Paine, Hanley.*

G. I. F. C.

C. A
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April 16, 17, 26

In re PRINTING TELEGRAPH AND CONSTRUCTION COMPANY OF THE AGENCE HAVAS. *Ex parte* CAMMELL.

Company—Director—Qualification—Implied Agreement to take Shares—Allotment—Registration—Allotment Sheets—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 25.

The articles of a company provided that the first directors should be allowed one month from the first general allotment of shares in which to acquire their qualification; that the office of director, in the case of a first director, should be vacated if he failed to get the shares within the prescribed period, or if he sent in a written resignation.

C. signed the memorandum of association for one share, and was appointed a first director. He attended several meetings, but never applied for his qualification shares. At the first general allotment however, without his knowledge, the requisite number of shares were allotted to him, and his name was placed on an allotment sheet which was kept as a temporary list of members and was signed by the chairman and secretary, but did not contain all the particulars required by the 25th section of the *Companies Act*, 1862. *C.* occasionally attended meetings before the expiration of a month from the first allotment of shares, but none afterwards. Shortly after the expiration of the month, the secretary requested *C.* to sign an application for the shares; but he refused to do so, and tendered his resignation of the office of director. After his resignation his name was transferred from the allotment sheet to the formal register of shareholders. The company was not in liquidation. On an application by *C.* to have his name removed from the register in respect of these shares:—

Held (affirming the decision of *Stirling*, J.), that there was no construc-

tive agreement on his part to take the shares; that the entry in the allotment sheet was not under the circumstances of the case a registration within the meaning of the *Companies Acts*; and that the directors had no authority to put his name on the register after his resignation. His application was therefore allowed.

Semble, that if the allotment sheets had been intended by the directors as a register of shares within the Act, and had been so treated by them, the mere informality of the entry in some particulars would not have made the registration invalid.

THIS was an appeal from an order of Mr. Justice *Stirling* (1), by which he directed the register of members of the *Printing Telegraph and Construction Company of the Agence Havas* to be rectified by removing the name of Mr. *C. Cammell* therefrom as the holder of forty shares.

The company was formed in March, 1893, with a memorandum and articles dated the 16th of March, 1893. Article 62 provided that the first directors should be appointed by a majority of the subscribers of the memorandum of association. Article 64 provided that the qualification of a director should be the holding of £200 share capital in respect of which all calls for the time being due had been paid; and that this qualification should apply as well to the first directors as to all future directors, but such first directors should be allowed one month from the first general allotment of shares in which to acquire their qualification. By article 70 it was provided that the office of director should be vacated, among other things, if a director ceased to hold the requisite number of shares, or, in the case of a first director, if he failed to get them within the prescribed time; or if he should send in a written resignation to the board, and the same should not be withdrawn for seven days, or be previously accepted.

Mr. *Cammell* signed the memorandum of association for one share, and was appointed one of the first directors; and his name appeared on the prospectus. On the 19th of March, 1893, the first board meeting was held, which Mr. *Cammell* attended. On the 29th of March the second board meeting took place, but Mr. *Cammell* was not present. At this meeting resolutions were passed for the allotment of shares in accordance with certain

(1) [1894] 1 Ch. 528.

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allotment sheets which included the name of Mr. *Cammell* in respect of forty shares of £5 each, for which, however, he made no application, and he was ultimately put on the register of shareholders as the holder of forty shares.

It did not appear in the evidence before Mr. Justice *Stirling* at what time Mr. *Cammell's* name was entered in the register, and fresh evidence on that point was taken before the Court of Appeal. It then appeared that the allotment sheets referred to above were prepared in the company's office for use at the directors' meeting of the 29th of March. They contained the names of proposed allottees, with the particulars concerning each required by the 25th section of the *Companies Act*, 1862, to be contained in the register of members, except that the occupations of the proposed allottees were not stated. In these sheets one column was provided for reference to the formal register of the company. The sheets were fastened together by a paper-fastener, and they bore the title of "Allotment Book," it being intended that they should be eventually bound up together. At the meeting of the 29th of March the sheets containing the allotments which were made were signed by the chairman and secretary. The company had no formal register until the 23rd of May, 1893, on which day the entries in the allotment sheets, including the allotment of forty shares to Mr. *Cammell*, were copied into the formal register.

On the 7th of April a third board meeting was held, at which Mr. *Cammell* was not present. On the 14th of April another meeting was held, at which he was present, and the minutes of the previous meeting of the 7th of April were confirmed. On the 29th of April the prescribed period of one month from the first general allotment of shares expired. On the 1st of May the secretary of the company wrote to Mr. *Cammell* informing him that a board meeting would be held on the 5th inst., inclosing a form of application for shares, and asking him to sign the same and forward it to the secretary together with a cheque for £10, the amount due on application. On the 5th of May the secretary again wrote, informing Mr. *Cammell* that a board meeting would be held on the 9th, and the letter proceeded: "I am requested by the board to ask your kind attention to the

inclosure forwarded to you at their request on the 1st inst., as the time allowed by the articles of association for the directors to qualify has expired, and the board is anxious that all should comply with the clause relating to this with as little delay as possible." On the 7th of May, Mr. *Cammell* wrote to Colonel *Engledew*, the chairman of the company, stating that he found it impossible to remain on the board, as he could not attend the meetings, and tendering his resignation. On the same day he wrote to the secretary formally resigning his office as director, and returning the form of application for shares, which, he said, would not now require his signature. Some further correspondence took place, which is set forth in the previous report. In July Mr. *Cammell* first heard that his name had been put on the register in respect of the forty shares; and on the 26th of that month he wrote to the secretary asking that it should be removed. In September he received notice calling on him to pay £85 in respect of the shares, and in October proceedings were commenced against him to enforce the call. On the 1st of November he gave notice of motion asking that the register of members might be rectified by removing his name therefrom as the holder of the forty shares. The company was not in liquidation.

Mr. Justice *Stirling* granted the application, and the company appealed.

Buckley, Q.C., and *E. Ford*, for the Appellants:—

Mr. *Cammell's* name was rightly put on the register for the shares which constituted his qualification as a director. He cannot say that he was ignorant of the shares having been allotted to him, for as a director he is estopped from saying that he did not know what resolutions the board had passed. He ought to have repudiated the shares if he intended to withdraw from the office of director. After the prescribed period had expired—that is, the 29th of April—it was his duty to accept the shares if he remained a director; and, if he did not do so, the directors had power to allot the shares to him, and nothing happened to terminate that authority. He did not send in his resignation till the 7th of May, and the fact of his tendering

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a formal resignation shews that he had not ceased to be a director on the 29th of April under the 70th clause of the articles of association; he must, therefore, be taken to have accepted the shares: *Ex parte Lord Inchiquin* (1); *Hewitt's Case* and *Brett's Case* (2); *Brown's Case* (3): *Isaacs' Case* (4). It appears from the fresh evidence that Mr. *Cammell's* name was placed on the allotment sheet on the 29th of March, and when that list was signed by the chairman and secretary it became the official register of the company. His name was, therefore, duly on the register for these shares before he sent in his resignation.

Hastings, Q.C., and *George Lawrence*, for Mr. *Cammell*:—

It is now beyond a doubt that Mr. *Cammell's* name was not on the register before the 23rd of May, which was long after he had sent in his resignation. Therefore those cases in which the director has been duly registered in respect of his qualifying shares have no application. The allotment sheets were not an official register within the 25th section of the *Companies Act*, 1862. They did not supply the necessary information respecting the members, and they only professed to be for a temporary purpose, and contained a reference to the folio of the formal register.

[They were stopped by the Court.]

[KAY, L.J., referred to *In re Underbank Mills Cotton Spinning and Manufacturing Company* (5).]

Buckley, in reply:—

The allotment sheets may have been intended for a temporary purpose, but until the formal register was made out they formed a sufficient register. They were open to inspection and the names of the members could be ascertained from them. The particulars of information to be given in the register under sect. 25 of the Act of 1862 are merely directory, and omissions of particulars in the register will not make the registration void.

(1) [1891] 3 Ch. 28.
(2) 25 Ch. D. 283.
(3) Law Rep. 9 Ch. 102.
(4) [1892] 2 Ch. 158.
(5) 31 Ch. D. 226.

The sheets formed a sufficient record within the Act: *Wolverhampton New Waterworks Company* v. *Hawksford* (1); *East Gloucestershire Railway Company* v. *Bartholomew* (2); *Irish Peat Company* v. *Phillips* (3).

LINDLEY, L.J.:—

I do not think we ought to reverse the decision of Mr. Justice *Stirling* in this case. This is a limited company formed in March, 1893, under articles of association, two of which are important. [His Lordship read articles 64 and 70.] *Cammell* was named as an original director in a prospectus issued shortly after the company was formed, and he attended one or two meetings during the first month of the company's existence. On the 29th of March, 1893, at a meeting at which he was not present, forty shares were allotted to him and the other directors as their necessary qualification. On the 7th of April another meeting was held, at which the minutes of the previous meeting were read. *Cammell* was not present at that meeting, but he was present at a meeting held on the 14th of April, when the minutes of the meeting of the 7th of April were read. There was some controversy whether he knew of the allotment. Mr. Justice *Stirling* came to the conclusion that he did not, and I accept that conclusion. On the 29th of April the month expired within which the original directors were bound to acquire their qualification shares. After the expiration of the month, and before there was any registration book of the company in existence, but after *Cammell's* name had been put on the allotment list, on the 29th of March, in respect of the forty shares, the secretary sent to *Cammell* a form of application for these shares, which *Cammell* never signed, and which he ultimately returned. In the beginning of May *Cammell* wrote once or twice excusing himself from attending the meetings of the directors, and on the 7th of May he sent in his resignation. On the 26th of July, *Cammell* having then recently ascertained that his name was on the register of members, wrote to the secretary requesting to have his name removed. In September he received a notice of a call

(1) 7 C. B. (N.S.) 795. (2) Law Rep. 3 Ex. 15.
(3) 1 B. & S. 598.

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in respect of these shares, and in October proceedings were commenced against him to enforce the call. On the 1st of November he gave notice of motion to rectify the register by removing his name therefrom. At that date his name was on the register. The motion was made under sect. 35 of the *Companies Act*, 1862, which authorizes an application to the Court where the name of any person is without sufficient cause entered in the register of members. *Cammell's* case is that his name was entered in the register without sufficient cause. The first question we have to consider is, When was he put on the register, and with what authority? In the Court below it was assumed that there was a proper register in existence before he sent in his resignation—namely, on the 7th of May—and that he had been put on the register in respect of these forty shares before that date. It now turns out that until some time after that date the only documents on which his name appeared were certain allotment sheets. His name was put on these allotment sheets on the 29th of March, and the question is whether these can be regarded as the register. The authorities which have been cited shew that a book or document intended to be a register may be admitted as a register, although the requirements of the Act of Parliament as to the keeping of a register have not been regularly complied with; but I am not aware of any authority for saying that rough memoranda or sheets of paper not intended as a register at all, but intended as materials from which a register may be prepared, can be a register. It is clear from the evidence that these allotment sheets were never intended to be the register. They were allotment sheets giving certain details respecting the allottees, and containing a column referring to the register, and were intended as materials from which the register was to be formed as distinguished from the register itself. We should be straining the language of the Act of Parliament and straining the evidence if we were to hold that these sheets constituted the register. *Cammell's* name was, therefore, not in fact put on the register until after he had resigned. But was there then any authority to put his name on the register? Mr. *Buckley* contended that the articles conferred on the company an irrevocable authority to put him on the register after the expiration of the month. I

do not think we can spell out of the words of the articles any such authority as that. These articles are not so strong as the articles in *Isaacs' Case* (1), where such an authority was implied. I do not think that the fact that *Cammell* sent in his resignation is conclusive; but I am much impressed with this fact—that the company did not treat him as being a shareholder in respect of these forty shares on the 29th of April, because the secretary of the company, instead of treating him as a shareholder, asks him on the 1st of May to sign an application for shares. His resignation, coupled with his refusal to do that which the company had invited him to do—viz., sign the application for shares—is, in my judgment, sufficient to put an end to the authority of the company. The company, therefore, had no warrant for putting his name on the register on the 23rd of May. The problem which we have to solve is easier than that which was presented to the Court below, as we have not to consider what would have happened if he had been placed upon the register at the earlier date. I think that the judgment of Mr. Justice *Stirling* was right, and that the appeal must be dismissed.

LOPES, L.J.:—

It is clear that *Cammell's* name was not on the formal register until after he resigned his post of director; but it is said that certain allotment sheets are in point of fact, under the circumstances of this case, to be regarded as the register. In my judgment, they cannot be so regarded. They are called "Allotment Book," and they are the materials from which the register is to be subsequently compiled. There are in these allotment sheets omissions of some of the requirements of the Acts of Parliament, though that may not be conclusive. But all these things go to shew that these allotment sheets were not intended to be the register. There is also the column containing references to the register, clearly shewing that the thing subsequently compiled by the company was to be the register; therefore *Cammell* resigned before his name was on the register. But it was said that as he did not resign until after the 29th of April, there was, under the articles, a continuing authority

(1) [1892] 2 Ch. 158.

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to the company to put his name on the register. But there is another matter which is important, viz., that that was not the view which the company took of their position, because they sent him on the 1st of May and on the 5th of May a form of application for shares, which clearly shews that they did not then regard him as a shareholder. That form he returned to the company without signing it. Therefore, there was no such continuing authority as has been contended for. In my opinion the decision of the Court below was right.

KAY, L.J.:—

In all the cases in which a person has been elected director, and has acted as a director, and by the terms of the articles ought to hold certain shares in order to qualify, I am extremely reluctant to allow him to escape from his obligation to take shares if I can find any reasonable means of holding him to his obligation. Lord *Selborne* thus sums up the law in *Brown's Case* (1). After dealing with the *Marquis of Abercorn's Case* (2), he says: "The other authorities are all cases in which, as a matter of fact, shares had been registered in the name of the director—which circumstance occurs in this case also—and in those other cases it was, in my opinion, most justly regarded as a very material fact to be considered, when a director tried to get rid of the shares actually registered in his name, that he had accepted the office of director, which a man ought not to fill without qualification. In such cases a director must have a qualification, and is bound as a director to be acquainted with what is done in the management of the affairs of the company. It was, therefore, a just conclusion of fact, that an act done by a person acting under the authority of the directors, the result of which was to place in the name of a director shares which he ought to have as a qualification—that that act was done by his authority, and that he could not be allowed to repudiate it. For my part, I see no reason to doubt that the various cases which arose on that state of circumstances were well decided." Lord *Selborne* then referred to certain *dicta* of Vice-Chancellor *Malins*, and continued: "The true result to be

(1) Law Rep. 9 Ch. 102, 106. (2) 4 D. F. & J. 78.

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drawn from those authorities appears to be, that the fact of a man accepting the place of director, for which the possession of a certain number of shares is a necessary qualification, is most material in determining whether he shall or shall not be permitted to repudiate, as unauthorized by himself, the registration of shares which, in the ordinary course of the business of the company, have actually been placed in his name, and which were needful for his qualification."

The first question is whether these allotment sheets, which are headed with these words, "Allotment Book," and which are not formally in the shape of a book, but are sheets of paper attached to one another by a pin, are a register within the meaning of sect. 25 of the *Companies Act*, 1862. I do not consider the word "book" in that section to be essential, and if these sheets had really been treated as the register until the formal book had been prepared I should be inclined to hold that the entry of *Cammell's* name in these sheets would be a sufficient compliance with the Act of Parliament as to registration, and *Cammell* could not then well have escaped. These allotment sheets were actually written before the shares were in fact allotted, but they were produced at the meeting of the 29th of March at which the shares were allotted, and were then adopted and were signed by the chairman. *Cammell* himself was not present at that meeting. The month within which *Cammell* was to acquire his shares expired on the 29th of April. During that interval he occasionally acted as director and attended meetings. After that time he never attended any meetings, and he sent excuses for not attending the meetings, but he did not formally withdraw from the directorate until the 7th of May. During that period there had been no other register in existence but these allotment sheets. Upon the whole, I come to the conclusion, for the reasons already given by the Lords Justices who have preceded me, that these sheets were not such a register as the Act requires. Therefore, until the 23rd of May we cannot treat *Cammell* as being on any register of the company. But he was then put on, he having withdrawn on the 7th of May. Mr. *Buckley* argued that the terms of the articles were such that *Cammell* was bound by an agreement to become a member, at any rate, from the 29th of April, and that

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after that date he could not object to registration. I cannot read the articles in that way. In *Isaacs' Case* (1) the words were: "shall be deemed to have agreed to take the said shares"; but these articles contain no such words as those. Therefore I do not think that point can succeed. But I have considerable difficulty as to another point. Between the 29th of April and the 7th of May, when *Cammell* withdrew from the directorate, he must be treated as having authorized the officials of the company to put his name on the register, and if in that interval his name had been put on the register he could not have repudiated that authority. Then, is his mere resignation of the position of director necessarily a determination of that authority? The obligation to become a shareholder put on him by the articles began from the time when he became a director, and at the end of the month within which he was allowed to acquire the shares the company had authority to put him on the register without any further communication with him. Did his mere resignation of the position of director put an end to that authority when the obligation to become a shareholder commenced from the time of his acceptance of the office? I do not think it necessary to give any decided opinion on that, because in this case something else occurred which did put an end to it. On the 1st of May the secretary sent him for his signature a form of application to take shares which he did not sign. He was not told then that shares had been allotted to him, and he did not know of such allotment. Again, on the 5th of May the secretary wrote again, calling his attention to the matter. *Cammell* never signed that application. On the contrary, he returned it unsigned. I think that that, coupled with his resignation, was enough to determine the implied authority of the company to put him on the register, and that the registration on the 23rd of May was too late. I confess I should have been glad to fix this gentleman with liability if it had been possible, and I regret that it is impossible to do so.

Solicitors: *Slaughter & May; Beyfus & Beyfus.*

(1) [1892] 2 Ch. 158.

M. W.

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WRIGHT, J.
Jan. 11, 17, 24.
C. A.
April 30

In re HERCYNIA COPPER COMPANY.

[00167 of 1892.]

Company—Winding-up—Contributory—Director—Consent to act as Director—Qualification Shares—Resignation of Office.

R. was named in the articles of association of a company, and in a prospectus issued by it, as one of its first directors. The articles provided that a director's qualification should be the holding of shares of the nominal amount of £250; and that the first directors might act before acquiring their qualification; but that, unless they did so within a month of their appointment, they should "be deemed to have agreed to take the same." *R.*, although not one of the original seven members of the company, signed and sent to the company prints of the prospectus and articles. He never acted as a director, nor paid for qualification shares; but more than a month after the company's incorporation he wrote a letter to the secretary resigning his office and referring to his "having consented to join the board":—

Held, by the Court of Appeal (affirming *Wright*, J.), that, in the winding-up of the company, *R.* was rightly placed on the list of contributories in respect of shares of the nominal value of £250.

THE *Hercynia Copper Company, Limited,* was registered on the 21st of July, 1891, under the *Companies Acts,* 1862 to 1890, with a capital of £165,000 divided into 16,500 shares of £10 each. Its registered office was at *Swansea.*

Clause 80 of the articles of association named six persons as the first directors of the company, *Arthur Richardson* being first on the list; but he was not one of the original subscribers of the memorandum and articles.

Clause 84 of the articles was as follows:—

"The qualification of a director shall be the holding of ordinary or other shares of the company of the nominal amount of £250. No shares represented by warrants shall be reckoned in the qualification of a director. The first directors may act before acquiring their qualification; but unless, within one month of their appointment, they acquire such qualification, they shall be deemed to have agreed to take the same, and the same shall be allotted to them accordingly."

On the 21st of July, 1891, but whether before or after the company was incorporated did not appear by the evidence,

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Richardson wrote to *F. H. Cheesewright*, the consulting engineer, as follows:—

"I duly received your letter enclosing a prospectus of the *Hercynia Copper Company, Limited*, which you asked me to sign, and which I return to you, as also the articles of association duly signed. I wired you this evening to this effect."

In this letter were inclosed a print of a prospectus about to be issued by the company (in which *Richardson* was named as a director) and a print of the articles of association, both of which had been signed by *Richardson*.

The other persons named as first directors in the articles attended board meetings; but *Richardson* never attended any such meeting, or otherwise acted as a director, and on the 8th of September, 1891, he wrote to the secretary of the company as follows:—

"After careful consideration I find it impossible to attend to the duties of a director of your board. I am fearfully pressed with business, and, *Swansea* being so far from town, I cannot give the time. I therefore think it my duty reluctantly to resign, which resignation please place before my co-directors, and take any other proper steps. When I consented to join the board I was much freer, and could then, as matters stood, have acted, but matters have cropped up since which make it impossible."

On the 10th of September, 1891, the secretary replied by letter to *Richardson*, stating that his letter of resignation had been placed before his colleagues, that they accepted the resignation, and stating also that they wished the writer to point out that, according to article 84, *Richardson* was liable for twenty-five shares, and asking him to send "your application, with a cheque for the amount of £5 per share, which is due up to date."

Richardson, however, never paid anything in respect of the shares, for it appeared from the evidence that he signed the articles and prospectus conditionally upon his being provided with the necessary qualification shares free of any expense to himself; and on the 21st of January, 1893, the company was ordered to be wound up.

The liquidator settled the name of *A. Richardson* on the list of contributories in respect of twenty-five shares.

Richardson took out a summons asking that his name should be excluded from the list of contributories.

The summons was adjourned into Court and heard before Mr. Justice *Wright* on the 11th, 17th, and 24th of January 1894.

Bingley (*C. Gregson Ellis*, with him), in support of the application:—

The name of the Applicant should be struck off the list of contributories. The articles of association, so far as they relate to the directors and their qualifications, are substantially the same as in *Isaacs' Case* (1); but in that case the director was held liable on an implied contract to take his qualification shares because he had acted as a director; whereas the Applicant in this case has never acted.

Whinney, for the liquidator:—

This case is governed by *Isaacs' Case*, which was followed by Mr. Justice *Kekewich* in *In re Bread Supply Association* (2).

The fact of the Applicant having accepted the office of a director is shewn by his signing the articles and prospectus, and by his letters; and when this fact has been established, the articles of association may be looked at in order to ascertain the terms upon which he accepted office. The letter of resignation is in itself strong evidence that the Applicant had accepted office, for he could not resign that which he did not hold: *Marquis of Abercorn's Case* (3); *Miller's Case* (4).

Under such circumstances, acting as a director is not essential to incurring liability for qualification shares, for the Applicant is estopped from denying that he is a director: *Ex parte Lord Inchiquin* (5).

Moreover, the name of the Applicant being on the list, the burden is on him to shew that it is improperly there.

[He also referred to *Brown's Case* (6).]

(1) [1892] 2 Ch. 158.
(2) W. N. (1893) 14.
(3) 4 D. F. & J. 78, 110.
(4) 3 Ch. D. 661.
(5) [1891] 3 Ch. 28, 36.
(6) Law Rep. 9 Ch. 102.

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Bingley, in reply:—

Mr. Justice *Stirling* has recently pointed out that *Brown's Case* (1) and *Ex parte Lord Inchiquin* (2) shew that, to fix a director with liability in respect of qualification shares, it is essential that he should have acted as a director at a time when he could not properly have done so without being qualified, and that by merely attending board meetings a person was not estopped from denying that he had agreed to take shares: *Ex parte Cammell* (3).

[WRIGHT, J.:—The articles there were different from those in the present case.]

If a person has agreed to become a director, but has changed his mind, or has retired almost immediately, or has not accepted qualification shares, and has not agreed to take them otherwise than inferentially by being a director, *Marquis of Abercorn's Case* (4) is an authority that he will not be a contributory: *Lindley* on Companies (5).

In *Miller's Case* (6), as well as in *Isaacs' Case* (7), the director was held liable because he had acted in that capacity.

WRIGHT, J.:—

This is a case of great difficulty; but on the whole I think it is one in which I ought to retain the name of the Applicant on the list of contributories. The case is in several respects peculiar, particularly with regard to the letters written by the Applicant, and the articles. By article 80 the Applicant was named as one of the first directors of the company. Article 84 was as follows. [His Lordship read this article, and continued:—]

These articles, purporting to appoint the Applicant a director and to provide for his qualification, must be considered with reference to the following facts: On the 21st of July, 1891, the very day when the company was incorporated, and when a prospectus was intended to be issued, but whether before or after the incorporation I do not know, the Applicant wrote to

(1) Law Rep. 9 Ch. 102.
(2) [1891] 3 Ch. 28.
(3) W. N. (1894) 3; since reported [1894] 1 Ch. 528; on appeal *ante*, p. 392.
(4) 4 D. F. & J. 78.
(5) 5th Ed. p. 793.
(6) 3 Ch. D. 661.
(7) [1892] 2 Ch. 158.

the consulting engineer of the company, who was probably the prime mover in the affair, a letter referring to his having signed the prospectus and the articles; and from certain expressions in the letter it may be inferred that it was written after the company had been incorporated, and was intended to be acted upon by the company—in fact, it was intended as a letter to the company. The prospectus shews the name of the Applicant as a director, and he signed the articles. He certainly did not sign them as one of the ordinary signatories, and he must have done so for the purpose of authorizing the company to say that he had assented to the articles, and had for that purpose added his signature. He cannot have signed for no purpose whatever, or merely so as to contract with the other persons signing. He must have signed so as to shew his assent to a contract with the company, inasmuch as his assent was not otherwise wanted. The directors, other than the Applicant, attended board meetings, but the Applicant attended no such meetings, and he did not otherwise act as a director. On the 8th of September, 1891, he wrote to the secretary of the company as follows. [His Lordship read the letter, and continued:—]

I certainly should have been loth to say that a letter in which he says he finds he has made a mistake as to being able to act and resigns his office, amounted to an admission that he had agreed to take shares; but the terms of it may shew that he had, and the terms of the letter were stronger than a mere resignation. He says, "When I consented to join the board." I think the proper inference to be drawn is that, from the 21st of July to the 8th of September, 1891, he held himself out as a director. The answer of the company to that letter was that they would accept his resignation; but they allotted him his qualification shares, and he has been placed on the list of contributories. It is clear that the mere fact of being a party to the articles as one of the subscribers does not make a contract between the subscriber and the company; but the question here is—Was there an acceptance by *Richardson* of the office of director, or an agreement to accept it upon the terms of the articles? In *Isaacs' Case* (1), Mr. Justice *Stirling* and the Court

(1) [1892] 2 Ch. 158.

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of Appeal held that when a man has acted as director, he must be taken to have acted upon the terms of the articles, and some of the Judges indicated that it was their opinion that he must be taken to have done the same, even if he has not acted, provided that he has agreed to act. There was then here an acceptance by *Richardson* of the office of director, or an agreement by him to accept it upon the terms of the articles. If so, he is bound by article 84. On the whole, I think that he did accept the office of director. I think that the fact that he authorized the company, by the letter of the 21st of July, 1891, to hold him out to the world as a director, and allowed himself to be named as a first director, is evidence that he agreed to accept the office upon the terms of the articles, and he in consequence agreed to take the shares. That conclusion is fortified by his own statement in the letter which he wrote on the 8th of September. His name, therefore, must remain on the list of contributories.

F. E.

C. A.

Richardson appealed from this decision.

The appeal was heard on the 30th of April, 1894.

C. Gregson Ellis (*Bingley*, with him), for the Appellant:—

The learned Judge below relied on *Isaacs' Case* (1); but, in order to bring *Richardson* within that case, it is necessary to find some consent on his part to act as director. Signing the articles is not sufficient to make a contract to take the qualification shares. *Richardson* only signed them on the condition that fully paid-up qualification shares should be allotted to him. That, therefore, distinguishes this case from *Isaacs' Case*, where it was clear that *Isaacs* consented to act as director according to the articles.

Whinney, for the liquidator, was not called upon.

LINDLEY, L.J.:—

I do not myself feel the difficulty in this case that Mr. Justice *Wright* appears to have felt. The facts are as follows: [His Lordship stated them, and continued:—]

Judging from the terms of the letter of the 21st of July,

(1) [1892] 2 Ch. 158.

1891, and from the terms in which Mr. *Richardson* resigned his situation as director, I cannot think it is open to me to draw any inference at all, except this—that he did intend to become a director on the terms of the articles of association, to which terms he deliberately assented. This case is quite as strong as *Isaacs' Case* (1). The only difference between them is that in the latter case *Isaacs* had acted as a director; whereas here *Richardson*, though he did not act as a director, assented to becoming one on the terms of the articles, and he cannot shew any ground why he should not be treated as having become a director.

I am of opinion, therefore, that the learned Judge below was perfectly right.

LOPES, L.J. (after stating the facts, continued):—

The question is, what, under the circumstances, is the fair inference to draw? The inference I draw is that *Richardson* agreed to become a director on the terms of the articles of association, and therefore agreed to take the shares they required him to take in order to qualify him for the office of director.

I do not feel any sympathy for persons who put themselves in this position. They allow their names to appear as directors of the company, and they hold themselves out as directors of the company. They hold shares for which they pay nothing, and when the company turns out unsuccessful they want their names taken off the register.

In my opinion, *Richardson's* name must remain on the list.

KAY, L.J.:—

I agree.

Solicitors: *J. J. G. Pugh*, agent for *G. J. L. Morgan, Swansea; Slaughter & May.*

(1) [1892] 2 Ch. 158.

G. I. F. C.

C. A.
1894
May 2.

In re SECURITIES INSURANCE COMPANY.

[00278 of 1893.]

Practice—Appeal by Persons not Parties—Leave to Appeal—Scheme of Arrangement—Joint Stock Companies Arrangement Act, 1870 (33 & 34 *Vict. c.* 104)—*Companies Act,* 1862 (25 & 26 *Vict. c.* 89), *s.* 124.

A judge having made an order sanctioning an arrangement under the *Joint Stock Companies Arrangement Act,* 1870, an appeal was presented by persons whose interests as creditors were affected by the scheme, but who had not opposed the scheme at the meeting of creditors, nor appeared before the Judge when his sanction was applied for, nor obtained leave to appeal:—

Held, that the right of appeal under the Act is governed by the *Companies Act,* 1862, s. 124, which gives a right of appeal subject to the same conditions as appeals from decisions in the ordinary jurisdiction of the Court; and that, as according to the practice of the Court of Chancery a person not a party to the proceedings could not appeal from an order without the leave of the Court, the present appeal must be dismissed, the appellants not having obtained leave, and the case not being one in which the Court thought that leave ought to be given.

THE *Securities Insurance Company* was incorporated in January, 1891, under the *Companies Acts* as a limited company. On the 24th of October, 1893, an extraordinary resolution was passed for the voluntary winding-up of the company with a view to its reconstruction under a scheme of arrangement with its creditors and policy-holders, under the *Joint Stock Companies Arrangement Act,* 1870 (33 & 34 Vict. c. 104).

The Appellants were the holders of a policy of assurance given by the company for guaranteeing until the year 1910 the payment of interest on the debenture stock of another company. They alleged that they had a present claim against the company under this policy, in respect of the years 1892 and 1893, for a deficiency in the interest on the debenture stock as well as an uncertain claim for future deficiency. After the commencement of the winding-up proceedings some negotiations took place between the Appellants and the liquidators as to payment by the company of a definite sum in satisfaction of all claims of the Appellants, but no concluded arrangement was come to.

On the 7th of February, 1894, the scheme came before the Court for its sanction, and Mr. Justice *Wright* made an order sanctioning it, and declaring it binding on all creditors and policy-holders. A meeting of creditors had been previously held by the direction of the Court to consider the scheme. The Appellants attended by proxy at the meeting, but did not vote, nor did they appear before Mr. Justice *Wright* to oppose the confirmation of the scheme.

The Appellants now appealed from the order of Mr. Justice *Wright*. They had previously applied *ex parte* to the Court of Appeal for leave to appeal, and the Court had declined to give it, intimating at the same time a doubt whether leave was necessary.

Swinfen Eady, Q.C., and *Eve*, for the Respondents, took the objection that the Appellants, not being parties to the proceedings, could not appeal without leave of the Court.

Farwell, Q.C., and *George Lawrence*, for the appeal:—

Mr. *Buckley*, in his work on the *Companies Acts* (1), states the practice to be that any creditor or contributory may appeal without leave. There is no general order or rule which makes leave necessary. In *Palmer's* Company Precedents (2), the rule is stated to be that the Official Liquidator or any creditor or contributory can appeal, and it is not said that leave is necessary.

[*Swinfen Eady* referred to *In re Markham* (3).]

[LINDLEY, L.J.:—Before the *Judicature Acts*, the practice was pretty well settled that, whether in a petition or an action, a person not a party to the proceedings and not served could not appeal without leave. What is there to alter that?]

A winding-up petition differs from all other proceedings, because all persons interested are served by the statutory advertisements, and are in effect parties.

[LINDLEY, L.J.:—You might have appeared by virtue of the advertisements; but can you be a party if you do not?]

The present proceeding is under the Act of 1870, and under

(1) 6th Ed. p. 314. (2) 5th Ed. p. 858.
(3) 16 Ch. D. 1.

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In re SECURITIES INSURANCE COMPANY.

that Act the same rules apply as under the Act of 1862. The only section in that Act relating to appeals is sect. 124.

[LINDLEY, L.J.:—That section refers to the old practice of the Court of Chancery. On a petition I never heard of any one who was not served and did not appear appealing without leave from the order.

LOPES, L.J., referred to *In re Anglo-Californian Gold Mining Company* (1).]

That is strongly in our favour. Our client is injured by the proceedings, and ought to be at liberty to appeal.

[KAY, L.J.:—I always have understood the rule to be that any person interested who is not an actual party to the record must obtain leave before he can appeal, and I think it a beneficial rule.]

[*Swinfen Eady* referred to *Watson* v. *Cave* (2).]

Persons interested abstain from appearing, because they trust to the Court looking into the scheme and taking care that it does not unfairly affect the rights of any of them. They ought, therefore, to have a right to appeal if their interests are unduly affected.

Swinfen Eady, Q.C., and *Eve*, for the Respondents, were not further called upon.

LINDLEY, L.J.:—

I think that our decision must be in favour of the preliminary objection. A petition is presented by the liquidator of a company for an arrangement under the *Joint Stock Companies Arrangement Act*, 1870. The Appellants are gentlemen who might have attended and appeared in Court upon that petition but did not. It seems a little doubtful whether they were present at the meeting which was convened before the petition came on; but if they were they did not raise any objection. Now, without having been present upon the petition, they appeal without leave. They are not out of time, for they served their notice of appeal within three weeks after the date of the order sanctioning the scheme; and the question is whether they have

(1) 1 Dr. & Sm. 628. (2) 17 Ch. D. 19.

any right to appeal without leave. Upon looking at the matter closely, I have very little doubt that they have not. The Act of 1870 provides that it is to be read and construed as part of the *Companies Act*, 1862, and therefore must be taken as incorporating sect. 124 of the *Companies Act*, 1862, which runs thus: "Rehearings of and appeals from any order or decision made or given in the matter of the winding-up of a company by any Court having jurisdiction under this Act, may be had in the same manner and subject to the same conditions in and subject to which appeals may be had from any order or decision of the same Court in cases within its ordinary jurisdiction, subject to this restriction, that no such rehearing or appeal shall be heard unless notice of the same is given within three weeks after any order complained of has been made . . . ."

Now, what was the practice of the Court of Chancery before 1862, and what has it been since? I understand the practice to be perfectly well settled that a person who is a party can appeal (of course within the proper time) without any leave, and that a person who without being a party is either bound by the order or is aggrieved by it, or is prejudicially affected by it, cannot appeal without leave. It does not require much to obtain leave. If a person alleging himself to be aggrieved by an order can make out even a *primâ facie* case why he should have leave he will get it; but without leave he is not entitled to appeal.

In this particular class of cases, it appears to me that that practice ought not to be lightly departed from. It would be in the highest degree inconvenient if, after a Judge had sanctioned a scheme, persons who did not take the trouble to attend the proceedings could without leave embarrass the proceedings by giving notices of appeal within three weeks. It would be a course which many people would be very glad to adopt, and we are not disposed to facilitate such conduct. I think the rule under the old Chancery practice is perfectly well settled; and even in the winding-up of companies with which I was once familiar, I do not recollect a case of a person who alleged himself to be aggrieved appealing without leave, unless he had in some way or other made himself a party to the proceedings. I am of opinion that the objection must prevail.

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In re SECURITIES INSURANCE COMPANY.

LOPES, L.J.:—

I am of the same opinion. I am not familiar with the Chancery practice; but the practice as stated by the Lord Justice *Lindley* seems to me to be the right one.

KAY, L.J.:—

I am of the same opinion, and I do not think I can usefully add much to what my Brother *Lindley* has said. I think that the 124th section shews that the practice to be observed in winding-up cases must be the same as the practice of the same Court in cases of appeal in matters other than a winding-up, and I think it was the invariable practice of the Court of Chancery, where a person was not a party on the record, to treat him as not entitled to appeal against an order made in the cause or matter, although he was aggrieved by it, without getting leave; but if he is aggrieved by it it is very easy for him to obtain leave. I do not think there is any hardship in applying that very convenient rule to a case like this. Here a scheme has been approved at meetings of creditors and contributories, and has been sanctioned by the Judge. These persons who now want to appeal had the opportunity of being present at those meetings. They were there, we are told, either in person or by proxy, and they did not oppose the scheme. They had the power of being present when the Judge sanctioned the scheme, and of opposing the application for his sanction. They were not present, and did not oppose it. In fact, they have not in any way whatever made themselves parties to this proceeding in the winding-up; and, not having done so, they seem to have felt it was a case in which they could not appeal without getting leave. Accordingly they, on the materials now before us, applied for leave to appeal, and leave was refused. Then they appeal without leave. I think it would be an extremely inconvenient thing to allow persons so circumstanced to appeal without first obtaining the leave of the Court. As they have not got leave, and are not in a position to obtain it, I think that this appeal must be dismissed.

Solicitors: *Slaughter & May; Gush, Phillips & Co.*

H. C. J.

In re X. (A PERSON THROUGH MENTAL INFIRMITY INCAPABLE OF MANAGING HIS AFFAIRS).

C. A.
1894
May 28.

Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), s. 116, *sub-ss.* 1 (*d*), 2; *ss.* 120, 128—*Settled Lands—Tenant for Life—Person incapable of Managing his Affairs—Person appointed by Judge to exercise Powers—Power of Sale vested by Settlement in Tenant for Life—Order authorizing Exercise of Power.*

X., the tenant for life in possession of a settled estate, was a person incapable of managing his affairs, within the meaning of sect. 116, sub-sect. 1 (*d*), of the *Lunacy Act*, 1890; and by an order under the same Act *Y.* had been authorized to receive the rents of and let and manage the settled estate.

The settlement contained a power enabling each successive tenant for life in possession, with the consent of the trustees, to sell the settled estate. The trustees were willing to consent to a proposed sale of part of the settled estate, and the Master had found that the sale was desirable; but a question was raised as to whether under the provisions of the *Lunacy Act*, 1890, *Y.* could be authorized to exercise the power of sale :—

Held, that under sects. 120 and 128 of the *Lunacy Act*, 1890, or one of them, the Court had power to authorize *Y.* to exercise the power of sale vested in *X.* by the settlement.

UNDER the limitations of the settlement of a landed estate, made in the year 1858, each person thereby made tenant for life of the settled hereditaments was, when, and as he should be in the actual possession of or entitled to the receipt of the rents and profits of the said hereditaments, empowered, with the consent in writing of the trustees therein named or the survivor of them, his executors or administrators, to sell or exchange for other hereditaments all or any of the settled hereditaments.

X., the present tenant for life of the estate, was a person, through mental infirmity, incapable of managing his affairs within the meaning of the *Lunacy Act*, 1890, s. 116, sub-s. 1 (*d*); and by an order made by the Judge in Lunacy in 1891 *Y.* was, under the provisions of the same Act, sect. 116, sub-sect. 2 (1), and

(1) Sect. 116, sub-sect. 2, is as follows: "In the case of any of the above-mentioned persons not being lunatics so found by inquisition, such of the powers of this Act as are made exerciseable by the committee of the estate under order of the Judge shall be exercised by such person in such

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sect. 120, authorized (*inter alia*), in the name and on behalf of *X.*, to receive and give discharges for the rents of the estate, and to let and manage the said estates, and out of the rents to keep down the charges thereon.

It was now in contemplation to sell a part of the settled estates which comprised the mansion-house and park, and *Y.* made application under the *Lunacy Act*, 1890, for an order authorizing him to make the sale. The Master in Lunacy considered the contemplated sale a desirable one, and proposed to make an order authorizing *Y.*, on behalf of *X.*, to exercise the power of sale in the settlement; but the question was raised whether, having regard to a decision of the Lords Justices in the case of *In re Baggs* (1), the Court had authority under the Act to

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manner and with or without security as the Judge may direct, and any such order may confer upon the person therein named authority to do any specified act, or exercise any specified power, or may confer a general authority to exercise on behalf of the lunatic, until further order, all or any of such powers without further application to the Judge."

(1) 96 L. T. Journ. (Notes of Unreported Decisions), p. 198.

C. A. in Lunacy.

Dec. 18, 1893.

IN RE BAGGS (A Person of alleged Unsound Mind).

Lunacy—Lunatic not so found—Person lawfully Detained—Tenant for Life—Person appointed to exercise Powers of Committee—Power of Sale under Settled Land Acts—Jurisdiction—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *ss.* 116, 120, 128, 341—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 3, 53, 62.

MARTHA BAGGS, a widow, was a "person lawfully detained as a lunatic though not so found by inquisition," within the meaning of the *Lunacy Act*, 1890, s. 116, sub-s. 1 (*c*). By a settlement made in 1872, certain leasehold hereditaments were assigned to two trustees for the residue of a term of ninety-nine years upon trust for *Martha Baggs* during her life, with reversion to her children. The settlement contained a power to appoint new trustees, exerciseable by her during her life, but no power of sale. She was an inmate of *Colney Hatch Asylum*, and had no property other than her interest in these leasehold hereditaments, which were unlet and in bad repair, and subject to a ground-rent of £7 10*s.* per annum. This ground-rent was in arrear for more than a year, and it was feared that the landlord would re-enter. Both the trustees were dead. A purchaser having been found who had agreed to give £325 for the property if a title could be made, this was an application, made under sect. 116, sub-sect. 2, of the *Lunacy Act*, 1890, by a son of *Martha Baggs*, who was also the administrator of the surviving trustee, for an order authorizing the Applicant to exercise the powers of a committee of the alleged lunatic's estate so as to appoint new trustees of the settlement for the purposes of the *Settled Land Act*, 1882, and to

make such an order, and the application now came on before the Court.

It was heard upon a statement of facts, the 5th paragraph

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sell the property under the power of sale conferred by that Act.

This application was adjourned into Court by direction of the Judge.

Bissill, in support of the application:—

Under sect. 120 of the *Lunacy Act*, 1890, the *quasi* committee could sell the life interest as property belonging to the alleged lunatic. As to the reversion, the *quasi* committee could, under sect. 128, exercise the power vested in the lunatic in the character of trustee by sect. 53 of the *Settled Land Act*, 1882. The sale is clearly for the benefit of the alleged lunatic, and I submit that the Court has jurisdiction to make the order.

[He referred to the *Lunacy Act*, 1890, ss. 116, 120, 128, and to sect. 341 as to the definition of "trust" and "trustee"; and he also referred to the *Settled Land Act*, 1882, ss. 3, 53, 62.]

LINDLEY, L.J.:—

This is one of the cases which are not provided for by statute. We are asked to authorize the Applicant, under the provisions of the *Lunacy Act*, 1890, to exercise the power of a committee of the alleged lunatic so as to appoint new trustees and to sell the property under the powers of the *Settled Land Act*, 1882.

Here the tenant for life is not a lunatic so found by inquisition, but a person lawfully detained. So she is not a lunatic within the meaning of sect. 62 of the *Settled Land Act*, 1882, which is expressly limited to lunatics so found, and the committees of their estates.

There is nothing, then, in the *Settled Land Act* which authorizes us to make this order. We are, however, asked to do it under the *Lunacy Act*, 1890, by a combination of sects. 116, 120, and 128. But, on looking at the language of those sections, there is nothing in them which authorizes us to make the order. Sect. 120 looks most like so doing; but it does not meet this case. It is suggested that the alleged lunatic, as tenant for life, is a trustee within the meaning of the 53rd section of the *Settled Land Act*, 1882. But the language of that section—viz., that a tenant for life shall, in relation to the exercise by him of any power under the Act, "be deemed to be in the position and to have the duties and liabilities of a trustee" for the parties entitled under the settlement—is not sufficient to have the effect which is contended for. The tenant for life under the *Settled Land Act* has certain powers for the due exercise of which he is made responsible, and if he does anything improperly he is made liable; but he is obviously not by virtue of sect. 53 made a trustee within the meaning of sect. 128 of the *Lunacy Act*, 1890. The truth is, that the Court has at present no power to do what is asked in this case. This lady must be found lunatic by inquisition, and have a committee of her estate appointed, and then it can be done.

A. L. SMITH, L.J., and DAVEY, L.J., agreed.

Solicitor: *Etherington.*

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of which comprised the following statement: "The power of sale in the settlement of 1858 does not include the mansion-house, but in the re-settlement of 1886 special provisions were inserted extending the powers of sale contained in the *Settled Land Act*, 1882, so as to allow the sale of the mansion-house or any sale under that Act."

It appeared, however, that as a matter of fact the power of sale contained in the settlement of 1858 was without any restriction whatever, and the re-settlement of 1886 had no bearing upon the question before the Court.

Cozens-Hardy, Q.C., and *Ingle Joyce*, for the Applicant:—

The statement in the 5th paragraph of the statement of facts is incorrect. The settlement of 1858, under which it is proposed to make the present sale, vests in each successive tenant for life in possession of the settled estate a power of sale with the consent in writing of the trustees, and without restrictions of any kind; so there is a power to sell the mansion-house and park.

[DAVEY, L.J.:—Our decision in *In re Baggs* (1) was that in consequence of the language used in the *Settled Land Act*, 1882, s. 62, the powers of that Act could not be exercised on behalf of a lunatic tenant for life, except where he was a lunatic so found by inquisition, and there was a committee. That case has no application to the present one.

LOPES, L.J.:—The words of sect. 62 of the *Settled Land Act* are perfectly clear upon the point.]

Sects. 116 to 130 of the *Lunacy Act*, 1890 (2) apply not only

(1) *Ante*, p. 416, n.

(2) The material portions of sects. 120 and 128 of the *Lunacy Act*, 1890, are as follows:—

Sect. 120: "The Judge may, by order, authorize and direct the committee of the estate of a lunatic to do all or any of the following things:—(*a*) Sell any property belonging to the lunatic . . . . (*l*) Exercise any power or give any consent required for the exercise of any power where the power is vested in the lunatic for his own benefit, or the power of consent is in the nature of a beneficial interest in the lunatic."

Sect. 128: "Where a power is vested in a lunatic in the character of trustee or guardian, or the consent of a lunatic to the exercise of a power is necessary in the like character, or as a check upon the undue exercise of the power, and it appears to the Judge to be expedient that the power should be exercised or the consent given, the committee of the estate, in the name

to lunatics so found by inquisition, but also to lunatics not so found in certain cases, including persons like *X.*, incapable of managing their affairs. The most material of those sections are 120 and 128. The power made exerciseable by sect. 120 (*l*) must be one "vested in the lunatic for his own benefit."

The proposed sale is for the benefit of the tenant for life, and the Master in Chambers so found, for he has approved of the sale, subject only to the question as to the power of the Court to make the order. If it is not a power vested in the lunatic for his own benefit within sect. 120 (*l*), it must be a power vested in the lunatic in the character of a trustee within sect. 128. Now sect. 120 (*l*) corresponds with sect. 136 of the *Lunacy Act*, 1853, and sect. 128 is in reality a re-enactment almost *verbatim* of sect. 137 of that Act; and although the precise point now before the Court may not previously have arisen (as limitations in settlements giving powers of sale to tenants for life are exceedingly rare), the Court has held that it had jurisdiction under sect. 137 of the Act of 1853 to authorize the exercise of analogous powers by the committee of a lunatic. Thus, in *In re Nevill* (1), it was held that the Court had jurisdiction under sect. 137 of the Act of 1853 to authorize the committee of a lunatic to consent to the exercise of a power of advancement; and in *In re Blake* (2) *Cotton*, L.J., held that the Court had power under the same section to authorize a committee to exercise a power to appoint new trustees vested in a lunatic tenant for life.

C. T. Mitchell, for the trustees:—

It appears that the proposed sale will be beneficial, and I am not here to oppose it; but on behalf of the trustees, I desire to point out to the Court that in *In re Baggs* (3) your Lordships did consider the sections of the *Lunacy Act*, 1890, which have been referred to in this case, and held that you could not make the order under them.

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and on behalf of the lunatic, under an order of the Judge, made upon the application of any person interested, may exercise the power or give the consent in such manner as the order directs."

(1) 31 Ch. D. 161.

(2) W. N. (1887) 173.

(3) *Ante*, p. 416, n.

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[LINDLEY, L.J.:—This case has nothing to do with the *Settled Land Act*, 1882.]

Then there is the question whether this is a beneficial power within the meaning of sect. 120 (*l*) of the *Lunacy Act*, 1890, or a trustee power within the meaning of sect. 128.

[LINDLEY, L.J.:—It is partly one, and partly the other.]

As to the cases, a power of consent has always been held to be a beneficial power; but, no doubt, the power in *In re Blake* was not a beneficial one, and I admit that that case is an authority.

LINDLEY, L.J.:—

Now that we understand the facts, there is no difficulty at all in holding that the Court has power to authorize the gentleman who is appointed to take care of the supposed lunatic in this case to exercise the power of sale in the settlement. The difficulty has arisen from a mis-statement in paragraph 5 of the statement of facts. The statement of facts must be amended and made right, otherwise the order will appear to be wrong. We are not asked to run counter to *In re Baggs* (1), or to run counter to the *Settled Land Act*, or anything of the kind; we are simply asked to apply sects. 120 and 128 of the *Lunacy Act*, 1890, to the power contained in the settlement authorizing the tenant for life with the consent of the trustees to sell (*inter alia*) the mansion-house. All difficulties are at an end if that is understood.

LOPES, L.J.:—

We clearly could not do this under the *Settled Land Act*. The power there given is confined to persons found lunatic by inquisition. The person in this case is not so found; but I am of opinion that, beyond all question, sects. 120 and 128 of the *Lunacy Act* of 1890, together with the powers contained in the settlement, enable that to be done which it is desired in this case to do.

DAVEY, L.J.:—I agree.

Solicitors: *Grover, Humphreys & Son.*

(1) *Ante*, p. 416, n.

W. W. K.

In re HODSON.
WILLIAMS *v.* KNIGHT.

[1893 H. 3894.]

CHITTY, J.

1894

April 17, 18; *May* 9.

Marriage Settlement—Wife an Infant—Covenant to settle After-acquired Property—Deed by Wife after attaining Full Age affirming Settlement—Not acknowledged.

Where a married woman, after attaining twenty-one, by deed though unacknowledged, affirms a settlement executed by her before her marriage, whilst an infant, such settlement is binding on her.

Barrow v. *Barrow* (1) and *Wilder* v. *Pigott* (2) discussed and followed.

THOMAS KNIGHT, by his will dated in 1862, devised and bequeathed to his trustees certain real and personal estate upon trust for his daughter *Eliza Heap* for life, and subject thereto upon trust for all his grandchildren living at the death of his said daughter, who being sons should attain twenty-one, or being daughters should attain that age or marry, in equal shares if more than one as tenants in common.

By a settlement dated the 3rd of January, 1879, being a settlement made prior to and in contemplation of the marriage of *Agnes Knight*, who was then an infant, one of the testator's grandchildren, with *C. M. Hodson*, certain sums of stock and cash, to which the said *Agnes Knight* would become absolutely entitled on attaining twenty-one, were assigned to trustees upon the usual trusts, and the settlement contained a covenant by the intended husband and wife that they would convey, assign, and transfer to the trustees all property whether real or personal to which *Agnes Knight* was then or to which during the coverture she or the said *C. M. Hodson* in her right should become entitled by any means whatsoever, and which should amount in value to the sum of £100, from any one source at any one time.

The settlement was not sanctioned by the Court under the *Infants' Settlement Act.*

By an indenture dated the 19th of June, 1880, indorsed on the settlement, and made between *Agnes Hodson*, formerly *Agnes Knight*, of the first part, *C. M. Hodson* of the second part, and

(1) 4 K. & J. 409. (2) 22 Ch. D. 263.

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Fernley Knight and *T. B. Hodson* of the third part, after reciting that the marriage had taken place, and that the said *Agnes Hodson* had attained the age of twenty-one years, and was then absolutely entitled in possession for her separate use to the several sums of stock and cash therein within mentioned, and that the settlement having been executed by her whilst an infant was not binding on her, and that she was desirous of varying the trusts and powers of investment; the said *Agnes Hodson,* by virtue of her separate estate and interest, after declaring and directing the several variations she was desirous of making, declared that, save and except such variations, the several trusts, powers, covenants, agreements, declarations, and provisoes contained in the there within-written indenture should take effect as fully and effectually and in the same manner in all respects as the same would have done if the said *Agnes Hodson* had been of full age when the settlement was executed by her.

This deed was not acknowledged by the said *Agnes Hodson* under the *Fines and Recoveries Act* nor under *Malins' Act.*

C. M. Hodson died in April, 1893, and the said *Eliza Heap* in June of the same year.

The real estate devised by the testator's will was sold by the tenant for life under the power conferred on her by the *Settled Land Act.*

The share of the said *Agnes Hodson* in the proceeds of sale and in the personal estate bequeathed by the testator amounted to £1380.

This summons was taken out by the trustees of the settlement to determine the question whether the share of Mrs. *Hodson* was bound by the settlement or belonged to her absolutely.

Chubb, for the trustees of the will.

Bovill Smith, for the trustees of the settlement :—

The fund is bound by the covenant in the settlement. The covenant was not void, but only voidable. If Mrs. *Hodson* had been of full age when she executed the settlement, it is not disputed that this contingent reversionary property would have been bound. By the deed of June, 1880, she deliberately

ratified the covenant, and when ratified it was as binding as if it had been originally made by a person who was *sui juris*: *Barrow* v. *Barrow* (1); *Smith* v. *Lucas* (2); *Wilder* v. *Pigott* (3).

A man is bound by his covenant voidable on the ground of infancy unless he disaffirms it within a reasonable time after he comes of age: *Edwards* v. *Carter* (4). In *Burnaby* v. *Equitable Reversionary Interest Society* (5) a covenant for the settlement of her other and after-acquired property was entered into by a lady while an infant before her marriage; she did no act during the coverture affirming or disaffirming the covenant, and after her death it was held that the covenant could not be avoided and that the property was bound. In regard to her own voidable instrument, it is unquestionable that a woman can disaffirm it during coverture; it ought therefore to follow, that she can affirm it.

[He also referred to *Greenhill* v. *North British and Mercantile Insurance Company* (6), *Seaton* v. *Seaton* (7), and *In re Jones* (8).]

Byrne, Q.C., and *Ingpen*, for Mrs. *Hodson*:—

We submit that a married woman is incapable, either with or without the concurrence of her husband, of affirming her covenant entered into while she was an infant.

The affirmance of the voidable covenant is equivalent to a new covenant or a new disposition, which, being under coverture at the time, Mrs. *Hodson* could not enter into or make: *Seaton* v. *Seaton*; *Cooper* v. *Cooper* (9). In *Wilder* v. *Pigott* the deed had been acknowledged by the wife after she attained her full age, which was not done in this case.

In *Smith* v. *Lucas*, *Jessel*, M.R., was dealing with a question of the wife's separate estate, with regard to which as soon as the wife comes of age she is a *feme sole*.

[They also referred to *Hamilton* v. *Hamilton* (10) and *Pike* v. *Fitzgibbon* (11).]

(1) 4 K. & J. 409.
(2) 18 Ch. D. 531.
(3) 22 Ch. D. 263.
(4) [1893] A. C. 360.
(5) 28 Ch. D. 416.
(6) [1893] 3 Ch. 474.
(7) 13 App. Cas. 61.
(8) [1893] 2 Ch. 461.
(9) 13 App. Cas. 88.
(10) [1892] 1 Ch. 396.
(11) 17 Ch. D. 454.

CHITTY, J. *Bovill Smith*, in reply.

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In re HODSON. WILLIAMS *v.* KNIGHT.

1894. May 9. CHITTY, J.:—

The question is whether the sum of £1380, being the share of Mrs. *Hodson* under her grandfather's will, is bound by the settlement executed by her and her intended husband previously to their marriage in 1879. It represents her share in the proceeds of sale of realty directed by the will to be sold on the death of the tenant for life, but which was in fact sold by the tenant for life under the *Settled Land Acts*. When the settlement was executed, she was entitled to a contingent reversionary interest in the share. She was then a spinster and an infant in the twentieth year of her age. The settlement was not sanctioned by the Court under the *Infants' Settlement Act*. It contains a covenant by her and by her husband so framed as to include this share, whether it fell into possession during the coverture or afterwards. Her husband died in 1893, and her share fell into possession on the death of the tenant for life in June of the same year. She is absolutely entitled to the £1380 unless it is bound by her covenant in the settlement.

In June, 1880, shortly after she had come of age, she executed a deed relating to and indorsed on the settlement. In this deed her husband concurred, and the trustees were parties or named as parties to it. It recites, that the settlement having been executed by her while an infant was not binding on her, and the deed proceeds on this footing. It shews that on this footing she was then entitled for her separate use to certain property which the settlement had purported to deal with specifically. In regard to this particular property she varied the provisions and trusts of the settlement, including the trusts for investment. No question arises as to this property. Subject to these variations, she expressly ratified the settlement, declaring that (except as to the variations) the several trusts, covenants, and provisions of the settlement should take effect as fully and effectually in the same manner and in all respects as the same would have done if she had been of full age when the settlement was executed. The deed was not acknowledged by her under the *Fines and Recoveries Act* or Vice-Chancellor *Malins' Act*. There can be no

doubt that she deliberately intended to affirm the covenant in question, and that she did thereby solemnly affirm the covenant, subject only to the point now raised on her behalf that the disability of coverture precludes a married woman from affirming a covenant entered into by her while a spinster and an infant by any instrument which would not operate as a new disposition of property by a married woman. Put shortly, the objection is that a married woman is incapable, either with or without the concurrence of her husband, of merely affirming her covenant made while an infant. Now the husband was, of course, bound by his covenant. Her covenant was voidable only and not void. It was plainly for her benefit. In the case of a man the law is settled by the decision of the House of Lords in *Edwards* v. *Carter* (1). He is bound by his covenant voidable on the ground of infancy unless he disaffirms it within a reasonable time after he comes of age. What is a reasonable time depends on the circumstances of the case. If he allows the reasonable time to elapse without doing anything either affirming or disaffirming the covenant, it stands as absolutely binding on him. In *Edwards* v. *Carter*, the covenant was a covenant to settle property, and, a reasonable time having elapsed, the covenantor and the property the subject of the covenant were held to be finally bound in equity. This decision shews that the affirming, either expressly or tacitly, by allowing a reasonable time to elapse is not equivalent to entering into a new covenant or making a new disposition of the property comprised in the covenant. This distinction between a new promise and a ratification after majority of a promise made during infancy was maintained in *Harris* v. *Wall* (2), where ratification was defined to be any act or declaration which recognises the promise as binding—a definition which was subsequently approved of in *Mawson* v. *Blane* (3). These authorities dispose of the objection, so far as relates to the point that the affirmance of the voidable covenant is equivalent to a new covenant or a new disposition; but they leave the point as to the disability of coverture open for consideration. On this point the decision of Mr. Justice *Pearson* in *Burnaby* v. *Equitable*

(1) [1893] A. C. 360. (2) 1 Ex. 122, 130.
(3) 10 Ex. 206.

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Reversionary Interest Society (1) is not immaterial. There the covenant for the settlement of her other and after-acquired property was entered into by the lady during infancy before her marriage; she did no act during the coverture affirming or disaffirming the covenant, and it was held that after her death the voidable covenant could not be avoided, and that the property was bound. Thus far, then, there is no distinction between the voidable covenant of a woman afterwards marrying and that of a man. The disability of coverture does not extend to a case of equitable election; she can elect whether she will take under or against an instrument executed by another person, and she can elect out of Court: *Williams* v. *Baily* (2), *Smith* v. *Lucas* (3), and *Greenhill* v. *North British and Mercantile Insurance Company* (4). The right of election is the right to approbate or reprobate, to affirm or disaffirm. It would seem inconsistent to hold that she can exercise her right of choice in the case of an instrument executed by another, but not exercise the analogous right in reference to a voidable instrument executed by herself. In regard to her own voidable instrument, it is unquestionable that she can repudiate it—that is, disaffirm it—during coverture. If she has capacity to exercise her choice by disaffirming, it ought to follow, almost necessarily, that she can exercise her choice by affirming. In my opinion, however, the point is covered by authority. In *Barrow* v. *Barrow* (5) it was held that a married woman, by obtaining a decree for specific performance of a covenant in an ante-nuptial settlement, relating to real estate of which she was tenant in tail, had elected so as to bind in equity her interest in the real estate, and had become bound by her acts when covert to carry the whole of the settlement into effect. The circumstance that she had obtained the decree shewed that she had deliberately acted and affirmed or confirmed (it matters not which term is used) the settlement; but she had not applied to the Court to assist her, nor had the Court assisted her, in determining her choice. In his judgment Lord *Hatherley* (then Vice-Chancellor *Wood*) refers to fraud, but in a loose sense

(1) 28 Ch. D. 416.
(2) Law Rep. 2 Eq. 731.
(3) 18 Ch. D. 531.
(4) [1893] 3 Ch. 474, 480.
(5) 4 K. & J. 409.

in which it would not now be employed. It is clear that the married woman was not guilty of any fraud in the proper sense of the term as now understood. There was no fraudulent misrepresentation or concealment on her part. What she was doing, when afterwards being discovert she sought to disaffirm the settlement, was to set up her coverture as a disability; and if her coverture did create a disability in law or in equity, a Court of Justice would not hold that it was a fraud to set up a disability which was allowed in law or in equity. The effect of the decision was to negative the disability. The principle of the decision was adopted and enforced by Mr. Justice *Kay* in *Wilder* v. *Pigott* (1). That case is not distinguishable from the present. There the married woman had by deed elected to confirm a settlement made by her while an infant, and it was held that her contingent interest in personalty was thereby bound. The circumstance that the deed had been acknowledged by her was immaterial, because Vice-Chancellor *Malins' Act* did not apply to the interest in question. The case, therefore, stands upon the deliberate intention of the married woman, expressed in writing, to recognise as binding a settlement which was voidable by reason of her infancy. I refrain from citing the judgment because the material parts have recently been set forth and adopted by Mr. Justice *Stirling* in *Greenhill* v. *North British and Mercantile Insurance Company* (2). For these reasons I hold that the fund in question is bound by the settlement of 1879.

Solicitors: *W. Houghton & Son; Parish & Hickson.*

(1) 22 Ch. D. 263, 267.

(2) [1893] 3 Ch. 474.

G. M.

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In re McHENRY.
McDERMOTT *v.* BOYD.

[1891 M. 1550.]

Bankruptcy—Annulment of Adjudication with Consent of Creditors—Purchase of Debts of Creditors—Secret Agreement with One Creditor—Validity—Fraud on Bankrupt Law.

A bankrupt, desiring to obtain the annulment of his bankruptcy, induced some of his creditors to assign their debts to two trustees, who were, as assignees of the debts, to consent to the annulment. The debts were accordingly assigned, in consideration of sums paid by the trustees to the creditors out of money provided by a third person, who had also an interest in procuring the annulment of the bankruptcy. On the petition of the bankrupt the Court made an order annulling the bankruptcy, with the consent of the persons in whom the debts which had been proved were vested. One of the creditors, whose proof had been admitted in the bankruptcy for £25,000, assigned his debt to the two trustees by a deed which stated that he did so in consideration of £2000 paid by them to him. But he had agreed with the bankrupt to execute this deed on the written undertaking of the bankrupt to pay him a further sum of £6000 at a future time. This agreement was not made known to the Court when the petition for the annulment of the bankruptcy was heard. The bankrupt having died, the creditor claimed in an action to administer his estate to prove for the £6000:—

Held, that this secret agreement with the bankrupt was invalid, and that the claim to prove for the £6000 could not be admitted.

SUMMONS by the Defendant *E. R. McDermott*, one of the executors of *James McHenry*, who died in 1891, and whose estate was being administered in the action, to vary the Chief Clerk's certificate, by disallowing a debt of £6000 thereby certified to be due to *Emil Levita*.

The Defendant *R. N. Boyd* was the other executor. The Plaintiff was a creditor of the testator.

On the 25th of March, 1886, the testator was adjudicated a bankrupt.

On the 8th of May, 1888, a proof by *Gustave Levita* was admitted in the bankruptcy for £25,000. In 1889 *Gustave Levita* assigned this debt to his brother *Emil Levita*. In the same year

McHenry was desirous of obtaining an annulment of his bankruptcy, and for this purpose he arranged with *H. L. Bischoffsheim*, against whom he had a large claim, and who also desired the annulment of the bankruptcy, that *Bischoffsheim* should provide money for buying up the debts of creditors. Accordingly *Bischoffsheim* paid £40,000 to Messrs. *F. W. R. Hore & St. John Wontner*, which they were to employ in buying up debts which had been proved in the bankruptcy. *Hore & Wontner* in pursuance of this arrangement procured assignments to be made to themselves of various proved debts. Among the debts so assigned to them was the debt of £25,000 due to *Emil Levita*.

The assignment was made by a deed dated the 20th of December, 1889, which contained a recital that the vendor had agreed with the purchasers to sell to them the debt at the price of £2000, and the assignment was expressed to be made in consideration of the sum of £2000 paid by the purchasers to the vendor.

On the 31st of January, 1890, *McHenry* presented a petition for the annulment of the bankruptcy. The petition stated that all the debts, proofs of which had been admitted, had been paid, satisfied, disposed of or assigned in the manner appearing in a schedule, and that the persons respectively in whom those debts were then vested were consenting that the adjudication should be annulled, and for that purpose had signed consents at the foot of the petition.

In the schedule it was stated that the proof of *G. Levita* had been admitted for £25,000, and that that debt was then vested in *Hore & Wontner* by a deed dated the 20th of December, 1889. *Hore & Wontner* signed the petition as consenting to the prayer thereof. The petition was served only on the trustees in the bankruptcy. The assignments of the debts of those creditors who had assigned their debts were produced to the Court upon the hearing of the petition, and copies of those assignments were filed with the proceedings. On the 24th of February, 1890, an order was made annulling the bankruptcy. The order stated that, "it appearing to the Court that all the creditors who have proved their claims in the bankruptcy" (other than one creditor whose debt was disputed by the debtor, but the amount of whose claim

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had been paid into Court to abide the further order of the Court) "have been paid or settled with or have signified their assent in writing to the prayer of the petition," the order of adjudication was thereby annulled.

Emil Levita claimed to prove in the administration action for £6000, on the ground that he had agreed to make the assignment of his debt to *Hore & Wontner* upon an undertaking by *McHenry* that, in consideration of his so doing, *McHenry* would pay him the sum of £6000 at a future time.

On the 17th of January, 1890, *McHenry* wrote the following letter to *Emil Levita*: "In consideration of your having at my request executed an assignment to Messrs. *Hore & Wontner* of a claim erroneously admitted against my estate, which had been assigned to you by your brother *Gustave*, I undertake, as soon as possible after the closing of the arbitration arranged between me and *Bischoffsheim* and *Goldschmidt*, to pay you the sum of £6000, agreed between us as an equitable settlement of disputed accounts."

Emil Levita deposed that, at the time of the making of the agreement between himself and *McHenry*, for the assignment to *Hore & Wontner* of the proof for £25,000 for a cash payment by them of £2000, and as part of that agreement, it was expressly agreed between him and *McHenry* that, if he would so assign the debt, *McHenry* would pay him the sum of £6000. He said that the agreement was a verbal one made between himself and *McHenry*. He made no agreement with *Hore & Wontner*; and the assignment subsequently executed by him to them of the debt was made by him in pursuance of the agreement so made with *McHenry*.

A memorandum (in terms nearly identical with the letter of the 17th of January, 1890) was prepared by Mr. *Addison*, *Levita's* solicitor, for signature by *McHenry*, and was sent by *Levita* to him in December, 1890, just after the execution of the assignment of the 20th of December. It was not signed by *McHenry*, but he afterwards wrote to *Emil Levita* the letter of the 17th of January, 1890. *Emil Levita* deposed that that letter "correctly records the effect of the verbal agreement previously made between myself and *McHenry*."

Herbert Reed, Q.C., and *Broxholm*, for the summons:—

The testator's promise to pay the £6000 was made without any real consideration. The only consideration was a past one.

[North, J., referred to *Steele* v. *Hoe* (1).]

A moral rather than a legal obligation was intended. *Levita's* debt was clearly purchased with a view to the annulment of the bankruptcy. It is the duty of a creditor who consents to the annulment of a bankruptcy not to do so upon the terms of some secret bargain which is concealed from the Court. The Court before it annuls a bankruptcy inquires whether the creditors have been all satisfied. Here the assignment of *Levita's* debt on which the Court acted was an absolute assignment in consideration of £2000, while there was a secret collateral agreement that he was to be paid an additional sum. This was a fraud on the bankruptcy law. The other creditors were misled, and if the Court had known the real facts the order annulling the bankruptcy would not have been made: *Hall* v. *Dyson* (2); *Jackman* v. *Mitchell* (3). One creditor cannot retain a secret advantage given to him, even though it is not to be derived from the bankrupt's estate: *Robson* v. *Calze* (4). Every person who is dealing with the Court is bound to disclose all the facts to the Court. The fact that *McHenry* and *Levita* were *in pari delicto* will not enable the latter to enforce the agreement: *Smith* v. *Bromley* (5).

Sir *A. T. Watson*, Q.C., and *Clauson*, for *Levita*:—

McHenry received the benefit of the agreement by which it is said his estate is not bound. This claim cannot be rejected unless it is shewn, (1.) that there was some scheme or composition by virtue of which all the creditors were to be put on an equality; (2.) that *Levita* obtained by the agreement an advantage over the other creditors; and (3.) that the agreement was not disclosed to the other creditors.

There was nothing of the nature of a scheme involving equality among the creditors. No proposal was made to the

(1) 14 Q. B. 431.
(2) 17 Q. B. 785.
(3) 13 Ves. 581.
(4) 1 Doug. 228.
(5) 2 Doug. 696, n.

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creditors generally. There was a separate negotiation with each creditor as to what he would take for his debt. The foundation of the doctrine relied upon is entirely wanting. As between *Levita* and *Hore & Wontner* £2000 was the only consideration for the assignment of the debt. There is no evidence that any other creditor was misled by any untrue statement. Nor is it proved that *Levita* obtained any secret advantage. In *Jackman* v. *Mitchell* (1), there was a composition, and there was independent proof that the agreement with the defendant was kept secret from the creditors. *Smith* v. *Salzmann* (2) shews that there is no fraud in such an agreement under the circumstances of the present case. *Ex parte Milner* (3) fully explains the law. *Robson* v. *Calze* (4) does not conflict with the other cases. In an action at common law upon such an agreement it would be necessary for the defendant to plead and to prove that the agreement was not known to the other creditors: *Davidson* v. *McGregor* (5). There is nothing to shew that the other creditors were influenced by what *Levita* did: *Howden* v. *Haigh* (6).

Swinfen Eady, Q.C., and *Gregson*, for the Plaintiff.

Broxholm, in reply.

NORTH, J. (after stating the facts, continued):—

The letter of the 17th of January, 1890, was written a month after the execution of the assignment of the debt to *Hore & Wontner*. If the assignment and the letter did not form one transaction there was no consideration for the agreement contained in the letter. If, on the other hand, it was all one transaction, we must consider what the effect of it was. I think it was one transaction to this extent, that it cannot be said that the giving of the letter was not part of the same arrangement as that under which the deed of assignment was executed, that is, although a month elapsed between the dates of the two instruments, the whole transaction might be taken as contemporaneous. But was it all one transaction? *Levita* in his affidavit says that

(1) 13 Ves. 581.
(2) 9 Ex. 535.
(3) 15 Q. B. D. 605.
(4) 1 Doug. 228.
(5) 8 M. & W. 755, 768.
(6) 11 A. & E. 1033.

it was. He says that it was part of the agreement under which he sold his debt for £2000 that he should be paid this additional £6000. In other words, that if he would assign his debt for £2000 to trustees, for the purpose of procuring an annulment of the bankruptcy, for which the consent of all the creditors was necessary, then in consideration of his so doing *McHenry* would enter into a private understanding or obligation, or whatever it may be called, to pay him at a future time a sum of £6000. Is such a transaction a valid one? In my opinion it is not. The order of annulment was obtained from the Court upon the footing that the debtor had settled with all his creditors who had proved claims against him, and would start from that time forward as free from the claims of the creditors in the bankruptcy. But in truth *Levita's* proof for £25,000 was not satisfied by the purchase of it for £2000, if the claim now made to prove for £6000 in addition can be allowed. In fact, the representation which was made, that this debt had been assigned to *Hore & Wontner*, and that they as the assignees of the proof for £25,000 consented to the annulling of the bankruptcy, was not true, if there remained outstanding a claim for £6000 in respect of the very debt as to which the power of consenting to the annulment had been given to *Hore & Wontner*.

Again, if the payment of this £6000 was part of the arrangement (as *Levita* says it was), why was not the arrangement carried out in proper form? Why did not the deed, which purported to state the whole transaction and the whole consideration, do so in fact? I think the reason is obvious. If it had been stated on the face of the deed that the claim was assigned to *Hore & Wontner*, in consideration of £2000 paid by them, and of an additional £6000 which *McHenry* had agreed to pay to *Levita* at a future time, it is obvious that the other creditors would at once have asked for further information, and would have wanted to know what was really being done. In fact, it is quite clear that the deed was prepared in the form in which it was for the purpose of concealing that part of the arrangement which related to the payment by *McHenry* of the £6000, and, looking at the transaction as it is stated in *Levita's* affidavit, it is obvious to me that this sum was offered by *McHenry* to

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Levita as an inducement to him to execute the assignment which was to be used for the purpose of procuring the annulling of the bankruptcy, so that the transaction might be put forward as a sale of the debt out and out for £2000. Is it open to *Levita* now to claim to prove for £6000 against *McHenry's* estate, upon the ground that the transaction was something totally different from that which it was represented by the deed to be? It is true that *Levita* was under no obligation to part with his claim in the bankruptcy. He might have refused to assent to the bankruptcy being annulled. But, when he assigned his debt to other persons, I think he ought to have taken care that the whole transaction, and not part of it only, was stated in the deed of assignment. As he has chosen to represent the transaction to be a sale of the debt out and out for £2000, it seems to me impossible that he can now be allowed to say that he is entitled to receive a secret bribe of £6000 for having armed other persons with the power of consenting to the annulling of the bankruptcy by a deed containing an untrue statement instead of a statement of the real facts. The statement in the deed was true so far as it went, but the most material part of the transaction was kept back. In my opinion, *Jackman* v. *Mitchell* (1) and *Hall* v. *Dyson* (2), as well as the earlier cases, *Nerot* v. *Wallace* (3) and *Murray* v. *Reeves* (4), are ample authorities for the conclusion at which I have arrived.

It was urged that *Levita* was not before the Court when the order annulling the bankruptcy was made, and that he was not the person who obtained the annulment by keeping back half of the truth. But he was a party to the arrangement which, according to his own account, was made by himself and *McHenry*, and *Hore & Wontner* are the persons through whom the arrangement made between *McHenry* and *Levita* was to be carried out, and, though *Levita* himself was not before the Court, the persons whom he had armed with this untrue statement of the facts were before the Court, and the assignment to them was made for the express purpose of enabling them to go before the Court and represent that the deed was a true statement of the transaction.

(1) 13 Ves. 581.
(2) 17 Q. B. 785.
(3) 3 T. R. 17.
(4) 8 B. & C. 421.

It was said by Sir *Arthur Watson* that the cases cited apply only to a composition scheme in which all the creditors come in upon equal terms, and that that is not so here. But that is not the way in which I regard the matter. I look at it in this way. Certain steps are taken for the purpose of procuring the annulment of the bankruptcy, and a person who is a party to those steps, and who as such represents that a transaction is one particular thing, is not at liberty to come forward afterwards for his own benefit and assert that the transaction is something totally different.

Then it was said that the representatives of *McHenry's* estate are bound to shew that some advantage was obtained by *Levita* over the other creditors, and that this arrangement was not disclosed to the other creditors, and that the Applicant has not proved that the other creditors were not told of the secret arrangement by which *Levita* was to have this £6000. I know what proofs have been made against *McHenry's* estate, and there is no other proof in respect of a similar claim. I know also that the story told by the deed was only half the true story, and that the rest of the arrangement was intended to be kept secret. A record of it was to be preserved as between *McHenry* and *Levita*, but not for the purpose of making it known to any one else. Again, the story as *Levita* tells it of itself indicates that the thing was intended to be kept secret; and this is certain, that no disclosure was made to the Court upon the application to annul the bankruptcy. If the *onus* of proof is upon the present Applicant, I think it has been sufficiently discharged by the establishment of the various facts which I have mentioned; and, if any one desires to assert that the arrangement was disclosed to the other creditors, I think he ought to have answered and explained away the facts to which I have just referred. But no such evidence has been adduced.

Under these circumstances, if the *onus* of proof is upon the present Applicant, in my opinion he has sufficiently discharged it.

Then it was said, that *McHenry* was just as bad as *Levita*. I think he was. There is not a pin to choose between the two. But then the well-known maxim applies, "*In pari delicto potior est conditio defendentis.*" And it must not be forgotten that *Levita* is

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claiming in competition, not with *McHenry*, but with *McHenry's* creditors, the estate being insolvent; and, if *Levita's* claim succeeded, the only result would be that the other creditors would receive so much the less.

In my opinion, therefore, the claim ought not to be admitted, and I must allow the summons to vary the certificate.

Sir *A. Watson*:—I submit that it should be allowed without costs. *McHenry* was *in pari delicto*, and he would not have been allowed costs.

North, J.:—

The question is between *Levita* and the other creditors—and this makes all the difference. It is not as if *McHenry's* estate had a surplus. I allow the summons with costs.

Solicitors: *Hores & Pattisson; Linklater & Co.*

W. L. C.

ALDIN *v.* LATIMER CLARK, MUIRHEAD & CO.

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Jan. 30, 31; *Feb.* 1, 2, 3; *May* 1.

[1893 A. 268.]

Easement—Access of Air—Grant of Land for Specific Purpose—Derogation from Grant—Injunction—Parol License—Revocation without Notice—Damages.

Under a grant of land expressed in general terms, and not made for any specific purpose, the grantee will not acquire a right by way of easement to the access of air, except where such right is enjoyed through a definite aperture in the nature of a window on the property granted, or through a definite channel over adjoining property; but the grantor of land to be used for a particular purpose is under an obligation to abstain from doing anything on adjoining property belonging to him which would prevent the land granted from being used for the purpose for which the grant was made.

Where, therefore, a lease was granted in order that the land demised might be used by the lessee for the purpose of carrying on the business of a timber merchant, and the lessee covenanted to carry on such business:—

Held, that the assigns of the lessor were not entitled to build upon adjoining property acquired by them from him, so as to interrupt the access of air to sheds upon the demised property used for drying timber, so as to interfere with the carrying on of the business in ordinary course.

The lessee, after the date of the lease, with the lessor's permission, but at his own cost, constructed certain ventilators in the walls of a building demised by the lease. The lessee gave no consideration for such permission, and no deed was executed giving him the right to use the ventilators. The ventilators were obstructed by buildings erected upon adjoining property by assigns of the lessor:—

Held, that the license being revocable, the lessee was not entitled to an injunction; but that, in the absence of reasonable notice of revocation, he was entitled to an inquiry as to damages in respect of the ventilators having been obstructed without such notice.

ACTION.

The Plaintiff was the lessee of certain land and buildings erected thereon at *Richmond* in *Surrey*, and by this action he claimed (*inter alia*) an injunction to restrain the Defendants, who were the owners of adjoining property, from interfering with the access of air to his premises by the erection of buildings upon their property.

The Plaintiff derived his title from one *John Munro*, who was also the predecessor in title of the Defendants. Previously to 1878 *Munro* carried on business as a stonemason and timber

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merchant on certain property at *Richmond* of which he was owner in fee subject to mortgages. In April, 1878, he agreed to sell to the Plaintiff the goodwill of his business of timber merchant, and also to grant him a lease of that portion of the property on which that business was carried on. Accordingly, by a lease dated the 1st of July, 1878, *Munro* and his mortgagees demised to the Plaintiff two pieces of ground, together with the stables, coach-house, office and other buildings then standing thereon, with the appurtenances for twenty-one years from the 1st of July, 1878, at the yearly rent of £160. The lease contained a covenant by the lessee at all times throughout the term to continue to carry on, in and upon the demised premises, "the timber trade heretofore carried on by the said *John Munro*." *Munro* covenanted for quiet enjoyment in the usual terms, and also that he would not during the term be interested either directly or indirectly in any timber trade within twenty miles (as the crow flies) of the parish church of *Richmond*. The Plaintiff entered into possession under this lease, and still continued in occupation of the demised premises, and had ever since carried on the business of a timber merchant there. By an agreement under seal dated the 7th of May, 1888, *Munro* demised to the Plaintiff an additional shed, which, by arrangement between them, had been erected on the premises at their joint cost, at a yearly rent equivalent to £7 10*s.* per cent. per annum on the amount of money advanced by *Munro* for the erection of the said shed or building, for the residue of the term granted by the lease, under and subject to the covenants and conditions in the lease contained; and the Plaintiff thereby agreed to pay such rent, and, so far as the same were applicable to the agreement, to abide by and perform all the covenants and conditions of the lease as if the agreement had formed part of the lease. *Munro* remained in occupation of the adjoining property, and carried on there his business of a stone merchant down to his death in 1892. In 1892, after the death of *Munro*, his devisees sold to the Defendants the whole of his property (including that demised to the Plaintiff); and the Defendants proceeded to erect on the site of the stonemason's yard extensive works for the purpose of supplying the town of *Richmond* with electric light,

The Plaintiff complained that in so doing they had interfered with the access of air to the drying sheds used in connection with his business of a timber merchant.

At the date of the lease and down to 1892, the greater part of *Munro's* yard was open, the principal building on it consisting of some stables. On the site of the yard the Defendants had erected buildings of considerable extent, the height exceeding that of the stables which were formerly there by about 30 ft. 6 in. The Plaintiff complained that these new erections of the Defendants injuriously affected the access of air to the sheds, so as to render them substantially less useful for the purpose of the business which the Plaintiff was bound by the lease to carry on upon the demised premises, and he brought this action to enforce his rights. It was contended on his behalf that the Defendants' acts constituted either a derogation from the grants contained in the deeds of the 1st of July, 1878, and the 7th of May, 1888, or else a violation of the covenants for quiet enjoyment therein contained. The Plaintiff also complained that the Defendants had, by their building operations, interfered with some ventilators in his stables, which, after the date of the lease, had with *Munro's* permission been put in by the Plaintiff at his own cost. No consideration was paid by the Plaintiff to *Munro* in respect of this permission, and no deed was executed giving the Plaintiff the right to use the ventilators when put in.

Hastings, Q.C., and *Ingpen*, for the Plaintiff:—

There was an implied covenant by the lessor, by which his assigns are bound, not to interfere with the reasonable carrying on of the business theretofore carried on upon the demised premises and which the lessee covenanted to continue. It is essential to the proper carrying on of that business that there should be a free current of air to the drying sheds for the purpose of seasoning the timber.

[STIRLING, J.:—The authorities require that the access of air should be through a definite channel over the servient tenement: *Harris* v. *De Pinna* (1).]

In that case there was no contract. None of the authorities

(1) 33 Ch. D. 238.

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are rested on contract. The only question is whether such a contract can be implied.

Hall v. *Lichfield Brewery Company* (1) is an express authority that a contract such as this will be implied in circumstances such as here exist.

Where a man contracts to let property to another for the purpose of carrying on a certain business, the lessor cannot, having regard to the covenant for quiet enjoyment, make alterations upon adjoining premises retained by him so as to prevent the carrying on of that business in the ordinary way.

In *Myers* v. *Catterson* (2) it was held that a railway company, on selling a portion of their surplus lands to the plaintiff, had entered into an implied obligation not to do or permit anything on land retained by them which would interfere with the plaintiff's reasonable enjoyment of the land he had purchased; and the defendants, who had bought from the company land adjoining the plaintiff's land, subject to any right of light which the plaintiff might have, were restrained by injunction from interfering with the access of light through a series of arches situated between the land of the plaintiff and that of the defendants. It is true that in that case the Court was dealing with the question of light; but the principle is the same: see also *Roberts* v. *Macord* (3), *Leech* v. *Schweder* (4), and *City of London Brewery Company* v. *Tennant* (5).

As to the ventilators, we say that the Plaintiff was licensee of *Munro* to put them in, and, he having incurred the expense of doing so, the Defendants cannot now obstruct them: *Winter* v. *Brockwell* (6).

[STIRLING, J., referred to *Goddard* on Easements (7) and *Wood* v. *Leadbitter* (8), there cited.]

The reference there is to an act to be done upon the land of the licensee; that is the distinction. The doctrine is stated by Lord *Kingsdown* in *Ramsden* v. *Dyson* (9), where he says: "If a

(1) 49 L. J. (Ch.) 655.
(2) 43 Ch. D. 470.
(3) 1 Moo. & Rob. 230, 232.
(4) Law Rep. 9 Ch. 463.
(5) Law Rep. 9 Ch. 212, 220.
(6) 8 East, 308.
(7) 4th Ed. p. 120.
(8) 13 M. & W. 838.
(9) Law Rep. 1 H. L. 129, 170.

man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation."

Finlay, Q.C., *Beale*, Q.C., and *Marcy*, for the Defendants:—

The law will not imply a grant except it is of something very definite. The undefined passage of air is too vague. It is something like a claim to amenity of prospect, the right to which cannot be acquired by prescription: *Webb* v. *Bird* (1); *Bryant* v. *Lefever* (2); *Harris* v. *De Pinna* (3).

[STIRLING, J., referred to *Hall* v. *Lichfield Brewery Company* (4).]

That case rested, like *Bass* v. *Gregory* (5), on the principle of the right to air passing through definite apertures; and in *Hall* v. *Lichfield Brewery Company*, the right to air was, moreover, coupled with the right to light.

On the evidence, there is not here any substantial interference with the access of air, and, even if there were, the claim is not sustainable in law. The lessor of land can use adjoining land retained by him in the ordinary way, provided that he does not interfere with the enjoyment of the land demised for the purposes contemplated. There is no implied grant of the right to the uninterrupted access of air through all the openings which existed at the date of the lease: *Robinson* v. *Kilvert* (6); *Potts* v. *Smith* (7).

The parol license given to the Plaintiff by *Munro* to put in the ventilators was revocable, and the Plaintiff is not entitled to any relief in respect of the obstruction to them: *Wood* v. *Leadbitter* (8).

(1) 13 C. B. (N.S.) 841.
(2) 4 C. P. D. 172.
(3) 33 Ch. D. 238.
(4) 49 L. J. (Ch.) 655.
(5) 25 Q. B. D. 481.
(6) 41 Ch. D. 88.
(7) Law Rep. 6 Eq. 311.
(8) 13 M. & W. 838.

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Hastings, in reply.

1894. May 1. STIRLING, J. (after stating the facts, continued):—

The legal principle invoked on behalf of the Plaintiff appears to be recognised in several modern cases. Thus, in *North Eastern Railway Company* v. *Elliot* (1), a case relating to a right of support, Lord *Hatherley* (then *Wood*, V.C.) says (2): "If a landowner conveys one of two closes to another, he cannot afterwards do anything to derogate from his grant; and if the conveyance is made for the express purpose of having buildings erected upon the land so granted, a contract is implied on the part of the grantor to do nothing to prevent the land from being used for the purpose for which to the knowledge of the grantor the conveyance is made." That is the principle established by the *Caledonian Railway Company* v. *Sprot* (3). In that case Lord *Cranworth* says that if a grant is made expressly to enable the grantee to build his house on the land granted, then there is an implied warrant of support subjacent and adjacent, as if the house had already existed. In *Robinson* v. *Kilvert* (4), a landlord let the floor of a house to a tenant for a paper warehouse, retaining a cellar immediately below. He afterwards commenced a manufacture in the cellar which required the air to be hot and dry, and employed heating apparatus which raised the temperature in the demised portion very considerably, with the result that some kinds of paper warehoused there were injured and made less valuable, though paper generally did not suffer. The landlord was ignorant at the time of the letting that the tenant was going to store any particular kind of paper which was liable to be deteriorated by heat which would not hurt paper generally; and it was held that the landlord was not liable, either on the ground of nuisance or derogation from his grant, or breach of the covenant for quiet enjoyment.

Lord Justice *Cotton* in that case said (5): "Then it was contended that there was an implied contract between the landlords and the tenant, of which the defendants' proceedings are a breach.

(1) 1 J. & H. 145.
(2) Ibid. 153.
(3) 2 Macq. 449.
(4) 41 Ch. D. 88.
(5) 41 Ch. D. 94.

The alleged contract is that the defendants would not do anything to interfere with the plaintiff's trade. Now to determine into what implied contract the defendants can be considered to have entered, we must consider what was known to them when they let the property. They undoubtedly knew that the plaintiff took it for the purposes of his business as a twine and paper merchant, but it is not shewn that they knew anything as to his dealing in any particular class of paper. A case was alleged as to injury to tissue paper, but the evidence failed to establish it, there was no evidence that the heat had injured it, and there was sufficient evidence to shew that the heat in this room would not injure ordinary kinds of paper. The defendants are not paper merchants, and cannot be assumed to have known, as it is not a matter of common knowledge, that such a degree of heat would injure this kind of paper, and it would in my opinion be wrong to imply a contract on their part not to do anything which would raise the temperature to this extent. The plaintiff saw the boiler in the cellar, and if he wished to have a temperature not rising above the natural temperature of the air he ought to have bargained for a stipulation in his lease that nothing should be done in the cellar which would raise the temperature on his floor. He asked to have a stove put into his room, which would give the defendants to understand that it was not necessary for him to have the air in its natural state. In my opinion, therefore, there is no such implied contract as the plaintiff contends, and he is not entitled to complain of what the defendants are doing." Lord Justice *Lindley* said (1): "Then as to the breach of an implied agreement for quiet enjoyment. We have here an agreement for a lease with nothing in it to shew that goods requiring any particular protection were to be kept on the premises. *Bandy* v. *Cartwright* (2) shews that under a demise by parol there is an implied covenant for quiet enjoyment. The lessors here are not at liberty to do anything which will make the property unfit for the purpose for which it is let. The extent of the operation of a covenant for quiet enjoyment has been enlarged by the later authorities. In *Sanderson* v. *Mayor of Berwick-upon-Tweed* (3) Lord Justice *Fry*, in delivering the judgment of the

(1) 41 Ch. D. 96. (2) 8 Ex. 913. (3) 13 Q. B. D. 547, 551.

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Court of Appeal, says: 'In coming to this conclusion we have not lost sight of the observations on the nature of such a covenant which were made by *Willes*, J., in *Dennett* v. *Atherton* (1). But it appears to us to be in every case a question of fact whether the quiet enjoyment of the land has or has not been interrupted; and, where the ordinary and lawful enjoyment of the demised land is substantially interfered with by the acts of the lessor, or those lawfully claiming under him, the covenant appears to us to be broken, although neither the title to the land nor the possession of the land may be otherwise affected.' This doctrine is in advance of the older authorities, but I accept it, and if the effect of what the defendants are doing had been to make the plaintiff's room unfit for storing paper I should have been prepared to hold that there was a breach. But the evidence falls short of that—it does not shew that the room is made unfit for a paper warehouse—but only that it is made unfit for storing a particular kind of paper. Now if a tenant wants extraordinary protection for a particular branch of trade, he must bargain for it in his lease." Lord Justice *Lopes* said (2): "Then as to the contention that the defendants have broken an implied agreement not to do anything which will make the property unfit for the purpose for which it was let, we must look to what the defendants at the time of letting knew as to the purpose for which the demised property was to be used. They knew that it was to be used for a paper warehouse, but they did not know that it was to be used for the storage of a kind of paper which would be damaged if the temperature were raised beyond the natural temperature of the air. If the goods to be stored wanted that special protection the plaintiff should have bargained for it."

The result of these judgments appears to me to be that where a landlord demises part of his property for carrying on a particular business, he is bound to abstain from doing anything on the remaining portion which would render the demised premises unfit for carrying on such business in the way in which it is ordinarily carried on, but that this obligation does not extend to special branches of the business which call for extraordinary protection.

(1) Law Rep. 7 Q. B. 316, 326, 327. (2) 41 Ch. D. 97.

Reference was made in argument to the cases which have arisen as to the right of access of air to buildings. It is laid down in *Aldred's Case* (1), that where there is a grant of windows then, "for stopping as well of the wholesome air as of light, an action lies, and damages shall be recovered for them, for both are necessary." In *Hall* v. *Lichfield Brewery Company* (2) damages were given in respect of an obstruction of air to apertures (in the nature of windows) in a slaughter-house, the right having been gained by user for between thirty and forty years. Again, it was held in *Bass* v. *Gregory* (3) that the right to the uninterrupted flow of air through a definite channel over adjoining property could be acquired by user for a sufficient period, and an injunction was granted to restrain interference with it. On the other hand, it was held in *Webb* v. *Bird* (4) that the owner of a windmill was not entitled to complain of the erection by the defendant of a school-house so as to obstruct the access of currents of air to the mill enjoyed over the defendant's land for upwards of twenty years; but Lord *Blackburn* (then *Blackburn*, J.), in expressing his concurrence with the judgment of the Exchequer Chamber, said (5): "I wish, for myself, to guard against its being supposed that anything in the judgment affects the common law right that may be acquired to the access of light and air through a window, or to the right to support by an ancient building from those adjacent." In *Bryant* v. *Lefever* (6) the action was for obstructing the access of air to a chimney (which had been enjoyed over defendant's land for more than twenty years) and thereby causing the chimney to smoke. Lord *Bramwell* (then *Bramwell*, L.J.) says (7): "We do not say there might not be an express grant or covenant not to interfere with the passage of air over neighbouring property, which could be enforced against the grantor or covenantor, and even against his assigns with notice; whether it could against assigns without notice it is not necessary to say." Further on he says (8): "There is this difference between the present claim and the claim to light. The right in that case is always limited to the

(1) 9 Rep. 57 b., 58 b.
(2) 49 L. J. (Ch.) 655.
(3) 25 Q. B. D. 481.
(4) 10 C. B. (N.S.) 268; 13 C. B. (N.S.) 841.
(5) 13 C. B. (N.S.) 844.
(6) 4 C. P. D. 172.
(7) Ibid. 177.
(8) Ibid. 178.

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particular window or aperture through which the light and air have had access; it is one, therefore, against which an adjoining owner can defend himself by blocking it up within the period necessary for the gaining of a right. Lord *Wensleydale* (1) thought this a very strong thing as a great burden on the adjoining landowner. But here the claim is of such a character that its enjoyment could only be prevented by surrounding the land with erections as high as it might at any time be wanted to build on the land." Again: "Where it has been said that there is a right to air, there is good ground for supposing that the wholesomeness of the air had been interfered with, or that there was some peculiarity in the land or building which made the air necessary in a definite place." *Cotton*, L.J., said (2): "Cases to prevent, or to claim damages for, interference with ancient lights, are frequently spoken of as cases of light and air, and the right relied on as a right to the access of light and air. But this is inaccurate. The cases, as a rule, relate solely to the interference with the access of light, and in no case has any injunction been granted to restrain interference with the access of air. It is unnecessary to say whether, if the uninterrupted flow of air through a definite aperture or channel over a neighbour's property has been enjoyed as of right for a sufficient period, a right by way of easement could be acquired." As I have already stated, it has been held in *Bass* v. *Gregory* (3) that such a right may be so acquired. These two cases deal mainly with the subject of acquisition of the right by user, and not with the rights conferred by deed of grant. The judgments to which I have referred appear to me to shew that under a grant expressed in general terms, and not made for any specific purpose, the grantee will not acquire a right by way of easement to the access of air except where such right is enjoyed through a definite aperture in the nature of a window in the property granted, or through a definite channel over adjoining property. On the other hand, I see nothing in these cases inconsistent with the principle recognised in *Caledonian Railway Company* v. *Sprot* (4), *North Eastern*

(1) See *Chasemore* v. *Richards*, 7 H. L. C. 349, 386.
(2) 4 C. P. D. 180.
(3) 25 Q. B. D. 481.
(4) 2 Macq. 449.

Railway Company v. *Elliot* (1), and *Robinson* v. *Kilvert* (2), that the grantor of land to be used for a particular purpose is under an obligation to abstain from doing anything on the adjoining property belonging to him which would prevent the land granted from being used for the purpose for which the grant was made. This seems to accord with the general rule that a grantor may not derogate from his own grant, and to be far more consonant with justice than that contended for by the Defendants, viz., that the grantee has no right of action unless the grantor can be proved to be acting maliciously.

In the present case, the lease of the 1st of July, 1878, was not merely granted for the purpose that the land demised might be used by the Plaintiff for the purpose of carrying on his business as a timber merchant, but it contains an express covenant binding him to carry on that business. In my opinion, *Munro* became subject to the obligation to abstain from doing anything on his adjoining property which would substantially interfere with the carrying on of that business in the ordinary course; and that obligation binds the present Defendants, as assigns from him, subject to the existing lease. By the instrument of the 7th of May, 1888, which is under seal, and for which valuable consideration was given by the Plaintiff, a like obligation became imposed on *Munro*, and to it the Defendants are subject. [His Lordship then proceeded to consider whether the evidence adduced at the trial established that the Defendants had violated such obligation; and he came to the conclusion that some injury to the drying sheds had been made out, but that the damage was not sufficient to justify the granting of an injunction. His Lordship then added:—]

I think that the Plaintiff is entitled to an inquiry what sum of money will compensate him for the damage done to him by reason of the Defendants' buildings rendering the sheds of the Plaintiff less fit for use by him in the ordinary course of his business as a timber merchant.

As regards the interference with the ventilators in the Plaintiff's stables, it appears that these did not exist at the date of the lease, but were first put in in the year 1881. The Plaintiff

(1) 1 J. & H. 145. (2) 41 Ch. D. 88.

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General Life Assurance Company to secure repayment to them of £700. On the 24th of March, 1888, the trustees of the insurance company obtained an order "that no part of the share of the Plaintiff *Arthur Paston Mack* of and in the £31,867 17*s.* 1*d.* Consols in Court to the credit of this cause, *Mack* v. *Postle*, the account of the legacy bequeathed to *Arthur Paston Mack* and his children, if any, be transferred, sold, or otherwise disposed of without notice" to the trustees of the insurance company. Subsequently *Arthur Paston Mack* executed a series of mortgages to the same trustees, still without disclosing the settlement, and on the occasion of each such mortgage a stop order was obtained similar in form to that above mentioned, though not absolutely identical in language. One of them, dated the 1st of July, 1891, directed that "no part or share of and in the funds" (specifying them) "be transferred, sold, paid out, or otherwise disposed of." In others the language was that "no part of the shares or interest of the Plaintiff, *Arthur Paston Mack*, in the funds" be transferred, sold, or otherwise disposed of. In none of the orders was the income of the fund expressly mentioned. On the 12th of January, 1894, the present summons was taken out, asking for payment of the income of the fund in Court to the trustees of *Arthur Paston Mack's* marriage settlement. This application was resisted by the trustees of the *Legal and General Life Assurance Company*, who claimed priority over the trustees of the settlement by virtue of their stop orders, and asked that the whole income should be paid to them.

Hastings, Q.C., and *Hadley*, for Mr. and Mrs. *Mack* and the trustees of the settlement:—

The stop orders obtained by the Respondents do not affect the income of the fund at all. They are upon the capital only, and that is not equivalent to notice to trustees by way of perfecting their title to the fund. The Court is not a trustee to receive such notice. Where a fund is paid into Court by trustees, they remain trustees of it until the Court has in some way dealt with it, and then the Court becomes the trustee: *Warburton* v. *Hill* (1).

[STIRLING, J., referred to *Lloyd* v. *Banks* (2).]

(1) Kay, 470. (2) Law Rep. 4 Eq. 222.

That merely decided that a trustee was not affected with notice on behalf of an assignee in bankruptcy by merely reading in a newspaper an announcement of the insolvency of his *cestui que trust.*

[STIRLING, J.:—Is there any authority to the effect that a mortgagee of a life interest must ask for payment of the income, that is to say, that he must actually take possession of his mortgagor's interest or lose his priority.]

The question is whether the obtaining a stop order on the capital of the fund is equivalent to notice, so as to affect the priority of the incumbrancers. We say it is not. It is not possible to give notice to the Court as a trustee. If the stop order had been upon the income the Paymaster-General would have made no further payments of income. The only mode of altering the priorities is by some operative order of the Court preventing any dealing with the fund.

Buckley, Q.C., and *R. F. Norton*, for the trustees of the *Legal and General Life Assurance Company*:—

The Court in determining the question as to the effect of the stop order is entitled to have regard to what the interest of the mortgagor is. On the face of them these orders are a stop upon the "share" of *A. P. Mack.*

The Court must find out what the stop order really does in each case: *Macleod* v. *Buchanan* (1). The form of each of these orders shews that it is the share or interest of *A. P. Mack* which is being dealt with, the order being that the fund is stopped, *i.e.*, so far as *A. P. Mack* and his assigns are concerned. That renders it necessary to inquire what his interest is. His interest, as tenant for life, is confined to the income of the fund. It is said that the Court is not a trustee. That is so, no doubt; but the effect of a stop order is stated in *Mutual Life Assurance Society* v. *Langley* (2), where *Cotton*, L.J., says, as regards a fund in Court, that the proper mode of giving effectual notice, and the best mode, is to obtain a stop order. It is suggested that the mortgagees of the interest of a tenant for life must either remain at

(1) 4 D. J. & S. 265. (2) 26 Ch. D. 686, 691; 32 Ch. D. 460, 469.

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peril, or practically take possession. No authority for such a proposition is cited. We submit that we are entitled, in priority to the trustees of the settlement, to receive the whole income of the fund.

Church, for the trustees of the will.

Hastings, in reply:—

The stop orders are not upon the income, and the priority of the trustees of the settlement is not displaced. The Paymaster-General, in acting on a stop order which is general in terms, does not treat it as affecting the income. Priority can only be affected by an order which practically stays the payment of the income. If *A. P. Mack*, suppressing his mortgage to the *Legal and General Life Assurance Company*, had effected another incumbrance upon his interest, and the second mortgagees had obtained a stop order expressly upon the income of the fund, they would have got priority. A stop order, general in terms, cannot affect the priority of incumbrances upon a limited interest in the fund. The real question is how such stop orders are acted upon in practice by the Paymaster-General.

1894. May 9. STIRLING, J. (after stating the facts, continued):—

Before dealing with the case in its legal aspect, I propose to say something as to the circumstances under which the order of the 24th of March, 1888, was obtained. I have before me the original summons which was taken out by the trustees of the insurance company, and it is in this form. It asks "that no part of the £31,867 17*s.* 1*d.* Consols in Court to the credit of the cause to which the Plaintiff, *Arthur Paston Mack*, is or may become entitled may be transferred, sold, paid, or otherwise disposed of, without notice to the Applicants." This application came, in the first instance, before the junior clerk in Chambers, and he, seeing that the interest of *Arthur Paston Mack* was in the income only, proposed to alter it by inserting before "£31,867 17*s.* 1*d.* Consols" the words "dividends to accrue on the." It appears that this was resisted by the Applicants; and I have the note of what took place before the junior clerk and before the Chief Clerk. The

notes shew that the junior clerk, after making the alteration I have mentioned, directed this application to stand over because some further application was to be made with reference to the payment of the dividends, and the parties could perhaps make some arrangement to keep down the interest on the mortgage out of the dividends. It did stand over for a time, and in the meanwhile, *Arthur Paston Mack* having attained twenty-five, a summons for the payment of the whole income to him was taken out. The Chief Clerk dealt with the stop order question before he made a final order upon the summons, and the note which I have before me in his own handwriting is, "Order may go, though strictly it should only affect dividends." I have seen the Chief Clerk, and he tells me that it was suggested in Chambers by the Applicants that if the order was confined to the dividends only they would not be entitled to notice upon a change of investment, which of course might affect their interest. I think the Applicants were wrong in this contention, because a tenant for life is entitled to notice of an application for change of investment, and equally an incumbrancer on a tenant for life's interest must be entitled to such notice, and, therefore the order would be more accurate if it had gone in the form which the junior clerk proposed. However, that was the conclusion arrived at by the Chief Clerk, who said they might take it in that form. Then there came before him the application for the payment of the whole income to *Arthur Paston Mack*, and on that he insisted, and rightly insisted in my opinion, that the consent of the incumbrancer should be obtained to that order, and accordingly the order of the 13th of April, 1888, for the payment of the whole income to *Arthur Paston Mack*, is expressed to be made notwithstanding the stop order previously made. As I understand, on all subsequent occasions the Chief Clerk has insisted on the presence of the incumbrancer whenever the fund was dealt with.

The various stop orders having been obtained under the circumstances which I have mentioned, it is next to be inquired what is the true construction of them. Certainly not one of them contains apt words for dealing with the income of the fund mentioned therein. I apprehend, however, that in ascertaining

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the effect of these orders the Court is not bound to confine its attention merely to the language of the orders themselves. In *Macleod* v. *Buchanan* (1), a stop order expressed in terms wide enough to affect the whole of a fund was held to be limited in its operation to a particular share of it. Lord Justice *Turner* says (2): "It is true that the order obtained by the trustees of the company in point of form affected the whole fund, but it affected it in point of form only. Such orders, although they are drawn up as affecting the whole fund, do not of necessity shew that the whole fund has been assigned; for every such order must affect the whole fund, as separate portions of the fund cannot be dealt with whilst the whole fund remains undivided. The form of the order, therefore, cannot be taken to shew the extent of the interest assigned; but for this information recourse must, if necessary, be had to the petition on which the order is founded, and which, of course, must in the body of it disclose the assignment. In most cases, however, as in this, it is not necessary to resort to the body of the petition for this information, for either the assignor joins in the petition, as is the case here, or is served with it, and this appears upon the order itself, which thus shews by whom the assignment has been made." Stop orders are no longer obtained on petition, but the judgment of the Lord Justice is material as shewing how the effect of stop orders is to be ascertained. If a petition could be looked at, *à fortiori* the Court may look at what appears in any part of the order itself. In each of these orders a mortgage by *Arthur Paston Mack* is entered as read, and by each the disposition of his share of the fund is restrained. The fund represents a legacy, and for the purpose of ascertaining what the share of *Arthur Paston Mack* is in the fund, the will of the testator must be looked at. When that is done, it is found that the only share of the fund to which *Arthur Paston Mack* is entitled is the income arising from such fund. Further, that income only is expressed to be dealt with by the several mortgages mentioned in the orders. It seems to me that under these circumstances the orders must be construed as affecting that income, for on any other interpretation each would be simply a nullity. It

(1) 4 D. J. & S. 265. (2) 4 D. J. & S. 272.

is said, however, that it is the practice of the Paymaster-General's Office to treat stop orders as not affecting income except when income is mentioned on the face of the order; and that in this very case these orders have been so regarded, and are mentioned in the certificates of the fund issued by the Paymaster-General under rule 99 of the Supreme Court Funds Rules, 1886, as affecting capital but not income. I have ascertained by inquiry at the Paymaster-General's Office that this statement of the practice is correct. I am further informed by the registrars that it is the practice of each of them in such orders to mention specifically income, whenever it is known to them that income is intended to be affected. The question then arises whether I am bound, having regard to this practice, to treat these orders as affecting capital only. For the purpose of determining this question I must consider, first of all, what is the general nature and effect of a stop order; and secondly, what are the duties and obligations of the Paymaster-General.

Now, as regards the question of the nature of a stop order, it was decided in *Dearle* v. *Hall* and *Loveridge* v. *Cooper* (1), and is now well-established law (see *Ward* v. *Duncombe* (2)), that where a fund is in the hands of trustees an incumbrancer on the interest of a beneficiary who gives notice to the trustees gains priority over an earlier incumbrancer who does not. It is equally well settled that where the fund is in Court an incumbrancer cannot effectually gain priority except by obtaining a stop order. So far as I can discover, the first reported case in which this was decided was *Greening* v. *Beckford* (3), but no reasons are there given for the decision. The foundation of the rule was carefully considered by Lord *Hatherley* (then Vice-Chancellor *Wood*) in *Warburton* v. *Hill* (4). In that case a judgment creditor of a person interested in a fund in Court had obtained charging orders on the debtor's interest, and had left copies at the office of the Accountant-General, and entries had been made of the orders, but he obtained no stop order. The Vice-Chancellor, although he did not decide the case on this ground, expressed the opinion that the judgment creditors'

(1) 3 Russ. 1.
(2) [1893] A. C. 369.
(3) 5 Sim. 195.
(4) Kay, 470.

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notice did not give priority, and he thus states the position (1): "Suppose a party did not think it necessary to go to the Accountant-General but came here and got the first stop order, he would effectually prevent the transfer of the fund, which mere notice to the Accountant-General would not do. . . . It has been decided, that notice to the trustee is sufficient to complete an equitable charge upon a trust fund, and that it is not necessary to make any inquiry of the trustees. . . . If that be so, it can only be on the principle that notice puts it out of the trustee's power to deal with the fund. If, therefore, a person obtaining a stop order is not affected by anything which the Accountant-General knows concerning the fund, it must be because he is only an officer of the Court, which is really the trustee; and therefore it is that the party should come to the Court to obtain a stop order, if he wishes to prevent a transfer of the fund. I see enormous inconvenience to the course of proceedings in the Court in holding the Accountant-General to be a trustee, not taking into account the personal consequences to him. He is the agent of the Court and nothing more; the Court is the trustee of the funds in his hands when it has made any order concerning them, and the person who paid them in remains the trustee until the Court has dealt with them." The point has been considered in some recent cases, and the first is *In re Holmes* (2). The Master of the Rolls says this (3): "By the practice of the Court of Chancery, when a fund was in Court the Court was considered to be in the position of a trustee, and a stop order had the same effect as the notice of an incumbrance to a trustee." Then Lord Justice *Cotton* says: "A stop order takes the place of notice to a trustee." In *Mutual Life Assurance Society* v. *Langley* (4), Lord Justice *Cotton* says (5): "The true principle is this. One ought to consider how will notice be effectually given so as to prevent the fund which is being dealt with being improperly dealt with? As regards the fund in Court, of which I will not call the Court a trustee, but which the Court has control and custody of, there

(1) Kay, 478.
(2) 29 Ch. D. 786.
(3) 29 Ch. D. 788.
(4) 32 Ch. D. 460.
(5) 32 Ch. D. 469.

the proper mode of giving effectual notice, and the best mode, is to obtain a stop order." Lord Justice *Bowen* says (1): "The doctrine upon which notice is necessary to complete the title, is a branch of the broad rule that you must do your best to perfect the transfer of possession, and the notice really goes as far towards equitable possession as you can go, because you affect with notice the person who has actual control of the fund. In order to go as far as you can towards equitable possession, you must direct your steps straight to the person in whose hands the fund is. He is the person who has obtained the control of it, and he is the person who alone ought to be dealt with as far as notice is concerned. If you have two sets of funds in the hands of two sets of persons, notice to one set is not sufficient notice to both. You must give notice to both. If you only give notice to one set, you have only given notice to those who are in possession of part. When you apply that reasoning to money paid into Court by the trustee, it is perfectly clear that as soon as the trustee has parted with the dominion and control of part of the fund—as soon as the fund is partly in Court—then the trustee has ceased to have control and dominion over the whole of it—he is no longer the person who has the control and dominion over the part that is in Court. It may be an inaccurate expression to say that the Court is trustee, or that the trustee ceased to be trustee when the money was paid into Court. He has no longer that sort of dominion over it which makes giving notice to him the best step to be taken towards equitable possession." Then Lord Justice *Fry* says (2): "I think the true inquiry when notice has been given or a stop order has been obtained, is, Where is the money? In whose hands is it? Under whose control is it? And in order to approach as near as you can to obtaining possession of the fund, you must go to those persons in whose hands the money is or under whose control the money is. You must give to them notice of your claim. It follows, therefore, that if the entirety of the fund in question at the time when the security is to be perfected is in Court, you must go to the Court and do that which is the only means of giving effect to your security before the Court, namely, obtain a stop order."

(1) 32 Ch. D. 471. (2) 32 Ch. D. 473.

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The object, therefore, of obtaining a stop order seems to me to be to give effectual notice, not to the Paymaster-General or to any particular officer of the Court, but to the Court itself. If the order when brought to the attention of the Court is such upon its true construction as to affect a particular interest, it would seem to me to be sufficient and effectual to give priority to an incumbrancer on that interest, unless there is something in the rules or practice of the Court which renders it specially necessary to bring home notice to the Paymaster-General. The position and duties of the Paymaster-General are defined by the *Court of Chancery (Funds) Act*, 1872 (35 & 36 Vict. c. 44), ss. 4, 9, the *Supreme Court of Judicature (Funds) Act*, 1883 (46 & 47 Vict. c. 29), ss. 2, 5, and the Supreme Court Funds Rules, 1886, rr. 45, 99. The Act of 1872 abolished the office of the Accountant-General, and sect. 4 says: "On the commencement of this Act . . . Her Majesty's Paymaster-General (in this Act referred to as the Paymaster-General) for the time being shall perform all the duties and exercise all the powers and authorities which before the commencement of this Act were performed by or vested in or capable of being exercised by the Accountant-General of the Court of Chancery." Sect. 9 says: "All securities and money vested in the Paymaster-General in pursuance of this Act shall vest in the Paymaster-General for the time being on behalf of the Court of Chancery without any conveyance, assignment, or transfer, notwithstanding the death or removal from office of the person who is Paymaster-General, and shall be held by him in trust to attend the orders of the Court of Chancery, and all acts done by the Paymaster-General with reference to such securities and money in pursuance of an order of the Court of Chancery shall be valid and effectual." By the *Supreme Court of Judicature (Funds) Act*, 1883, it is provided in sect. 2 that, "All securities and money at the time of the commencement of this Act vested in the Paymaster-General in pursuance of the *Chancery Funds Act*, 1872, and all securities and money at any time after the commencement of this Act transferred or paid into or deposited in Court, to the credit of any cause, matter, or account, in the Chancery Division of the High Court of Justice, shall be vested in Her Majesty's

Paymaster-General for and on behalf of the Supreme Court of Judicature, and shall continue to be and be subject to all the provisions of the *Chancery Funds Act*, 1872, and to the rules heretofore made and now in force under that Act, subject to such alterations therein and to such other and further rules as shall from time to time be made as thereby provided." Sect. 5 provides: "All acts done by the Paymaster-General with reference to money and securities in Court (whether such money and securities be paid, transferred, or delivered into Court under this Act or under the provisions of the *Chancery Funds Act*, 1872), pursuant to and in accordance with the provisions of any general rules of the Supreme Court of Judicature made under the provisions of the *Supreme Court of Judicature Act*, 1875, and Acts amending the same, shall be as valid and effectual as if they had been done in pursuance of an order of the High Court of Justice or of the Court of Appeal." By the Supreme Court Funds Rules, 1886, there is this provision in rule 45: "Except as provided in the last preceding rule, and subject to the provisions contained in rules 55, 56, 57, 70, 73, 74, and 109" (none of which affect the present case) "funds in Court shall not be paid, delivered, or transferred out of Court, nor invested, sold, or carried over, unless in pursuance of an order, or in the case of an investment of money or application of dividends unless in pursuance of an authority contained in a certificate of a Master in Lunacy." Rule 99 provides: "The Paymaster, upon a request signed by or on behalf of a person claiming to be interested in any funds in Court standing to the credit of an account specified in such request, may, in his discretion, issue a certificate of the amount and description of such funds, and such certificate shall have reference to the morning of the day of the date thereof, and shall not include the transactions of that day, and the Paymaster shall notify on such certificate the dates of any orders restraining the transfer, sale, delivering out, or payment, or other dealing with the funds in Court to the credit of the account mentioned in such certificate, and whether such orders affect principal or interest." That, I take it, means "capital or income." The words are not very apt. That rule imposed (I

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believe for the first time) on the Paymaster-General the duty of certifying whether stop orders affect principal or interest. As I have said, the certificates given by the Paymaster-General in the present case treat the stop orders obtained by the trustees of the insurance company as affecting capital and not income. That is not, as I think, the true construction of the orders; but if any person had been misled by the Paymaster-General's certificates, if, for example, the present Applicants had advanced money on the faith of those certificates, or if any official of the Court had been induced to make an order which otherwise would not have been made, then it seems to me that grave questions might have arisen. Nothing of the kind has happened. The marriage settlement was prior to all the mortgages and all the stop orders; the trustees of it have neglected to take the ordinary and proper step in order to make the assignment effectual. No officer of the Court has been misled by the orders or induced by the certificates either to do or abstain from doing anything which he would otherwise have avoided or done. On the only occasions on which either the capital or the income of the fund in Court has been sought to be dealt with the Chief Clerk has required the presence of the incumbrancers. Under these circumstances, I think I am at liberty to give effect to the stop orders according to what I consider their true construction, and therefore I hold that the incumbrances created by *Arthur Paston Mack* take priority over his marriage settlement.

I wish to add that it seems to me to deserve consideration whether in future care should not be taken in drawing up stop orders to express on the face of them plainly, whether capital or income or both are to be restrained, and whether in all cases where their operation is not so limited they ought not to be treated at the Paymaster-General's Office as extending both to capital and income. The clerks in the Paymaster-General's Office are not necessarily persons who have had a legal training, and even if they had, the materials which they have do not always enable them to put the true construction on the order. They can only look at the title of the account, which in this case does not appear to me to have been happily expressed; and

at the order which comes before them, which also in this case appears to me not to be happily framed. I think, therefore, that attention should be directed, in all cases in which stop orders are sought, to the question whether capital or income or both are to be affected.

Solicitors: *Church; Lawrence, Graham, Gray, & Sutherland.*

G. A. S.

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[1894 K. 637.]

Building Society—Instrument of Dissolution—Building Societies Act, 1874 (37 & 38 *Vict. c.* 42), *s.* 32—*Variation of Rights of Members—Liability of Advanced Members to pay up forthwith the whole Balance Due.*

It is competent for the members of a building society by an instrument of dissolution under sect. 32 of the *Building Societies Act*, 1874, to vary the rights of members under the rules by a provision in the instrument that members who have given notice of withdrawal shall have no preference or priority over members who have not given such notice.

Upon such an instrument taking effect it was held that advanced members could be compelled to pay up forthwith the balances due from them on their securities.

THIS was an action for the purpose of determining the rights and liabilities of the members of the *Charing Cross "Model" Building Society* under an instrument of dissolution dated the 1st of January, 1894, and made pursuant to sect. 32 of the *Building Societies Act*, 1874.

The society was a terminating building society, established and incorporated under the Act on the 20th of December, 1887.

By the rules of the society it was provided as follows:—

Rule 2: "The object for which this society is established is to raise funds by the subscriptions of its members to advance to them upon the security of freehold, copyhold, or leasehold property by way of mortgage. . . ."

Rule 6: "Should it at any time be deemed expedient to make any alteration, addition, or rescission of or to these rules, a special general meeting may be convened, and the course to be adopted (with the exception of rules 9, 11, 12, 13, 14, 16, and 24, which shall only be altered provided nine-tenths of the members agree in writing) shall be determined by a majority of those present. Members shall receive seven clear days' notice of any special general meeting."

Rule 16: "The sum of £100 shall be advanced in respect of each share . . . the subscriptions shall be 6*d.* per week for each

share, and the sum to be paid in respect thereof, as per rule 31, shall be one-third of the sum advanced. . . ."

Rule 25: "After a member has mortgaged property to the society, he shall first pay the premium (if any), then repay the principal by monthly instalments at the rate of £6 per share per annum. He shall then (except in cases where the subscriptions have been transferred to repayment account) pay at the same rate the balance of subscriptions due upon the shares in respect of which the advance was made, in order to make up the subscriptions to one-third of the sum advanced, as per rule 16."

Rule 30: "Members may receive back their subscriptions on unappropriated shares after the society has been established five years, or if admitted after such time, one year from the date of admission. . . . Subscriptions shall be returned in full to the withdrawing members in the order in which notice is given, and paid out of the repayments."

Rule 31: "Any member having mortgaged property to the society to secure an advance may redeem the same at any time by payment of the principal and such other moneys as may be due upon or in connection with the shares in respect of which the advance was made, in order to make his subscriptions up to one-third of the sum advanced, and receive back his deeds. He shall then, at the termination of the society, receive back his subscriptions as per rule 34. . . . Should any member desire to redeem and receive his deeds without paying up his shares as aforesaid, then he shall pay interest at the rate of 2½ per cent. per annum, calculated upon the yearly balances, and have the amount paid in as subscriptions returned to him."

Rule 34: "At the termination of the society the members shall have their subscriptions returned in full, together with their share of the net profits."

By the *Building Societies Act*, 1874 (37 & 38 Vict. c. 42), s. 32: "A society under this Act may terminate or be dissolved—

"1. Upon the happening of any event declared by its rules to be the termination of the society.

"2. By dissolution in manner prescribed by its rules.

"3. By dissolution with the consent of three-fourths of the

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members, holding not less than two-thirds of the number of shares in the society, testified by their signatures to the instrument of dissolution. The instrument of dissolution shall set forth—

"(*a.*) The liabilities and assets of the society in detail;

"(*b.*) The number of members, and the amount standing to their credit in the books of the society;

"(*c.*) The claims of depositors and other creditors, and the provision to be made for their payment;

"(*d.*) The intended appropriation or division of the funds and property of the society;

"(*e.*) The names of one or more persons to be appointed trustees for the special purpose, and their remuneration.

"Alterations in the instrument of dissolution may be made with the like consent, testified in the same manner. The instrument of dissolution and all alterations therein shall be registered in the manner provided for the registration of rules, and shall be binding upon all the members of the society.

"4. By winding up," as in the section mentioned.

On the 12th of December, 1893, at a meeting of the members of the society duly convened and held at its chief office, it was resolved that the affairs of the society should be wound up voluntarily by means of an instrument of dissolution which was read and explained to, and amended by, the meeting; such instrument to be executed by three-fourths of the members of the society, holding not less than two-thirds of the number of the shares in the society.

No resolution was passed at this meeting or subsequently for the alteration of rule 30.

By the instrument of dissolution, which was dated the 1st of January, 1894, and made pursuant to sect. 32 of the *Building Societies Act*, 1874, and signed by not less than three-fourths of the members of the society, holding not less than two-thirds of the number of shares in the society, it was (*inter alia*) agreed and declared as follows:—

"Clause 4.—After payment of the claims of creditors, the funds and property of the society shall be applied as follows:—

"(1.) In payment of the costs and expenses of and incidental to the dissolution.

"(2.) In payment to the members of the amounts standing to their credit in the books of the society, or in case of deficiency then in payment to the members rateably in proportion to the amounts standing to their credit as aforesaid.

"(3.) In payment of the sum of £10 as compensation to the holder of each share in respect of which no appropriation has been made.

"(4.) The surplus (if any) shall be divided among the members rateably in proportion to the amounts standing to the credit of the members respectively in the books of the society.

"Clause 5.—For all the purposes of this instrument the term 'member' shall mean and include all members of the society, whether they shall have given notices of withdrawal or not, and members who have given notice of withdrawal shall have no preference or priority over members who have not given such notice."

And the Plaintiffs were thereby appointed trustees for the special purpose of the dissolution.

There were, for the purposes of the argument in this case, four classes of members affected by the instrument of dissolution, viz. (1.) withdrawing members who had duly given notice of withdrawal, and had also signed the instrument of dissolution; (2.) withdrawing members who had duly given notice of withdrawal, but who had not signed the instrument; (3.) members who had not received any advance or appropriation, and had not given any notice of withdrawal; (4.) members who had received appropriations or advances from the society, and who had mortgaged properties as security for such advances in the manner provided by the rules of the society.

The Defendant *Jessie Wright* was one of the first class of members; the Defendant *Sarah Ann Gamlin* was one of the second class; the Defendant *William Scholefield* was one of the third class; and the remaining Defendant, *William Holyoake*, was one of the fourth class. These persons were respectively authorized by order of the Court to defend on behalf of all the persons in the same interest.

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The Defendant *Jessie Wright* by her defence alleged that she signed the instrument of dissolution upon the condition that she should only be bound thereby if the said instrument of dissolution did in fact bind all the members of the society.

The mortgage given to the society by the Defendant *William Holyoake* (which was in the usual form of the society's mortgages) was effected by an indenture dated the 17th of April, 1891, whereby, "in consideration of the sum of £400 to the mortgagor then paid by the society, being the amount to which the mortgagor was entitled as owner of four shares of £100 each in the society," the Defendant *William Holyoake* mortgaged certain property to the society, and it was provided that if "the mortgagor should pay to the society all subscriptions, fines, and other moneys, which according to the rules for the time being of the society should from time to time become payable in respect of the said four shares, and should observe and perform all the said rules, and also the covenants thereinafter contained, then the society should at any time thereafter, upon the request and at the cost of the mortgagor, indorse or cause to be indorsed upon those presents a proper receipt under their common seal, for all moneys intended to be thereby secured, and thereupon those presents should be vacated"; and it was agreed that in case the mortgagor should make default in the payment of the said subscriptions and other sums of money or any of them, or fail in other respects to observe and perform the said rules, covenants, and provisions, or any of them, then and in any or either of such cases the whole of the subscriptions or other payments in respect of the said shares intended to be thereby secured should thereupon immediately become payable and due, and it should be lawful for, but not obligatory upon, the society, without any further consent on the part of the mortgagor, to take possession.

There were no depositors in the society, and the society owed to outside creditors the sum of £12 15*s.* 6*d.*, which sum, by the terms of the instrument of dissolution, was to be paid out of the first moneys received by the trustees under the instrument. There was cash in hand far more than sufficient to pay this amount.

Various questions arose as to the effect of the instrument of dissolution, but the only two which call for a report were the

following: (1.) Whether the instrument of dissolution was effective to deprive the withdrawing members or any of them of any priority as regarded repayment conferred upon them respectively by rule 30; (2.) Whether the mortgagor members could be compelled to pay up forthwith the balances due from them respectively.

These two questions were argued separately.

W. D. MacConkey, for the Plaintiffs, stated the case.

F. Thompson, for the Defendant *Jessie Wright*.

J. Rutherford, for the Defendant *William Scholefield*:—

The instrument of dissolution is binding on all the withdrawing members of the society, whether they signed it or not. Sect. 32 of the *Building Societies Act*, 1874, is express that the instrument of dissolution shall be "binding upon all the members of the society." It is settled that withdrawing members who have not been paid are members within this section: see *Sibun* v. *Pearce* (1), where, although the rules provided that members who had given notice of withdrawal should cease to take part in the affairs of the society, it was held that such members, though their notices had expired, must be taken into account in ascertaining the statutory majority required to sign an instrument of dissolution.

Being then bound by the instrument of dissolution, they are bound also by the provision contained in it whereby members who have given notice of withdrawal are deprived of any preference or priority over members who have not given such notice. That provision is one relating to the "intended appropriation or division of the funds and property of the society," within the meaning of sub-sect. 3, clause (*d*) of sect. 32 of the Act of 1874. It was competent to the society to effect, by the instrument of dissolution, anything which might have been done by an alteration of their rules. By rule 6 the society are empowered to alter their rules, and it is clear that an alteration of rules to the same effect as clause 5 of the instrument of dissolution would be

(1) 44 Ch. D. 354.

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binding on all withdrawing members: *Barnard* v. *Tomson* (1); *Pepe* v. *City and Suburban Permanent Building Society* (2).

If the instrument is not binding on the withdrawing members it must be void *in toto*, and then the rules can be altered.

F. Broadbridge, for the Defendant *Sarah Ann Gamlin*:—

I submit that the provision in the instrument of dissolution affecting to vary the priority of the withdrawing members is *ultrà vires* and bad in law. I do not dispute that such a variation of priority could be effected by an alteration of the rules, but it cannot be done in any other way: *Auld* v. *Glasgow Working Men's Building Society* (3), and there has been no alteration of the rules in the present case by resolution or notice given as required by rule 6. Clause 5 of the instrument of dissolution is not such an "intended appropriation or division of the funds and property of the society" as is contemplated by sub-sect. 3, clause (*d*) of sect. 32 of the Act of 1874. Those words must be read as referring to a legal and proper appropriation or division, otherwise a society might be enabled to take away all the property of one class of members, and give it to another class. It could not have been the intention of the Legislature, that a majority of members, under the guise of an instrument of dissolution, should deprive other members of their vested rights.

T. R. Hughes, for the Defendant *William Holyoake*.

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Before the date of the deed of dissolution, the Defendant *Sarah Ann Gamlin* had given a notice of withdrawal under rule 30, which provides, among other things, that "subscriptions shall be returned in full to the withdrawing members in the order in which notice is given, and paid out of the repayments." The result is that at that date this Defendant was entitled to be paid out of such money as was available for that particular purpose, subject to the claims of those who had given notices of with-

(1) [1894] 1 Ch. 374. (2) [1893] 2 Ch. 311.
(3) 12 App. Cas. 197.

drawal of an earlier date than her own, but before all others whose notices were subsequently given. Thereupon she took what may be described as a vested interest in the funds available for repayment of the subscriptions of withdrawing members. It is no light matter to defeat a vested interest of that kind, and before deciding that such interest is defeated, the Court must be perfectly clear that the contract permits such a course, or that the Legislature has interfered with the ordinary contractual rights and introduced some paramount provision. The contract only goes to this, that the rules may from time to time be altered. It has been decided in a great many cases that a withdrawing member who has not been paid off is still a member for the purpose of the ascertainment and determination of his rights, including the question whether a dissolution shall take place. In the case of *Bradbury* v. *Wild* (1), which was recently argued before myself, all the authorities were considered. In that case I merely applied the law to the particular facts before me; but many cases, and amongst others *Rosenberg* v. *Northumberland Building Society* (2), were cited in reference to the position of a withdrawing member. It is clear that such a member is a member for the purpose of new rules, and if new rules are made within the ambit of the constitution of the society, those rules are binding on the withdrawing member notwithstanding that they prejudice the vested interest of such member. That seems to me to be now settled. But Mr. *Broadbridge* says, "I do not dispute that; but I say that there are no new rules, and therefore I am not bound in that way." Well, that is so, and it is not necessary to go into that branch of the law except for one point which, I think, arises under sect. 32 of the *Building Societies Act*, 1874. That section provides that "a society under this Act may terminate or be dissolved upon the happening of any event declared by its rules to be the termination of the society." I wish to point out that if the existing rules of any given society do not provide for the termination of the society on the happening of any specified event, those rules are capable of alteration; and if the Legislature had intended that the rules and the rules alone should govern the contractual relations of

(1) [1893] 1 Ch. 377. (2) 22 Q. B. D. 373.

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members in the event of dissolution, it would have left those relations to be determined by the rules. But the section proceeds: "By dissolution in manner prescribed by its rules." That means the rules as they exist or happen to be altered. That must be implied; and again on that I say that if the Legislature had intended that everything should be done by the rules, nothing would have been easier or simpler than to have left it for the society to make its rules to meet the occasion. The Legislature provides for dissolution in an entirely different way: "By dissolution with the consent of three-fourths of the members, holding not less than two-thirds of the number of shares in the society, testified by their signatures to the instrument of dissolution." That is an addition to dissolution according to the rules. In other words, as it seems to me, the Legislature has said in effect: "And every society shall for this purpose have a rule incapable of alteration, that if members, not being less than three-fourths of the whole number and holding not less than two-thirds of the number of shares, shall consent to a dissolution, such consent being testified by their signatures, then the society shall be dissolved notwithstanding that the written or private rules of the society do not provide for any such event." The terms of the sub-section seem to me, I must not say substituted for the rules, but added to them, as a necessary adjunct which is henceforward to be found in every set of rules, implied by legislative enactment. It is not denied that if the variation of the rights of members which is now objected to had been effected under the rules, it would have been sound, and no complaint could have been made. Why, then, should it not be capable of being done under legislative enactments such as I have mentioned? I think that a withdrawing member is as much liable to the parliamentary rule as to the private rules of the society; and, this having been done under the parliamentary rule, I think that the Defendant for whom Mr. *Broadbridge* appears is bound.

The question was then argued whether or not the mortgagor members would be compelled to pay up forthwith the respective balances due from them.

F. Thompson, for the Defendant *Jessie Wright*:—

The instrument of dissolution operates as a compulsory withdrawal, and consequently an advanced member can be called upon to pay the same amount as would be due from him if at the date of the instrument of dissolution he had sought to redeem his advance: *Brownlie* v. *Russell* (1); *Tosh* v. *North British Building Society* (2); *London Provident Building Society* v. *Morgan* (3).

J. Rutherford, for the Defendant *William Scholefield*, adopted the same argument.

T. R. Hughes, for the Defendant *William Holyoake*, the advanced member:—

Under the mortgage deed there is no obligation on this Defendant to pay otherwise than by instalments, and there is nothing in the instrument of dissolution to vary that obligation. *Brownlie* v. *Russell* is not in point. The subject-matter of dispute in that case was entirely different. There the plaintiff was the advanced member, and he was saying that, notwithstanding the dissolution, he was entitled to redeem on certain terms. The liquidator said that he was bound to go on, and the only question was as to the terms on which he was entitled to redeem. All the observations of the learned Lords were addressed to that, and there was no question as to his being compelled against his will to pay up at once; and the question whether he was so liable to pay was never discussed in argument. *Tosh* v. *North British Building Society* carries the matter no further. *London Provident Building Society* v. *Morgan* is not an authority against me, as it was based entirely on the distinction which exists where there are outside creditors to be paid, and where there are not. On the other hand, the case of *Scottish Property Investment Company Building Society* v. *Boyd* (4) is a direct authority in my favour. There the Court distinguished *Brownlie* v. *Russell*, and held that, there being no outside creditors unpaid, an advanced member

(1) 8 App. Cas. 235.
(2) 11 App. Cas. 489.
(3) [1893] 2 Q. B. 266.
(4) 22 Sc. L. R. 43; 12 Court Sess. Cas. 4th Series, 127.

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could not be compelled, on the society going into liquidation, to repay his loan otherwise than by instalments, as stipulated in his bond.

KEKEWICH, J.:—

This case is, I think, decided by authority, and there is no place for any criticism or hesitation on my part. *Brownlie* v. *Russell* (1) must, I think, be regarded as an authority of general application, and as laying down the law governing all cases which fairly come within its scope; and if *Brownlie* v. *Russell* lays down the law, which I think it does, there is no occasion for me in the present case to go further than that authority. The case of *Tosh* v. *North British Building Society* (2) cannot be said to carry the matter further than *Brownlie* v. *Russell;* but the value of it, as an authority for my guidance, is, that I find there an expression of opinion which, if not strictly contemporaneous with *Brownlie* v. *Russell*, followed closely upon it, and has this advantage, that it was given by the Lord Chancellor of the day, who took part as counsel in the argument in *Brownlie* v. *Russell.* I do not know where I could look for a better statement as to what was decided in *Brownlie* v. *Russell*, and if I can get a clear statement in that way, I do not think I ought to go any further. Lord *Herschell* (3), referring to that case, says this: "In *Brownlie's Case* it was held that after a winding-up an advanced member could not take advantage of the rule enabling him to withdraw, because his right to act under that rule ceased by reason of the order for winding up; but it was held that the winding-up order created a kind of compulsory withdrawal of all the members who were at that time advanced members of the society and compelled them to repay the amount which was still due upon their advances, but did not substantially alter their position or their rights or render them at all different from what they would have been if they had been withdrawing under the rules." When you examine that language, it is clear that the position of the advanced member is substantially altered to this extent—that the winding-up operates to make an immediate withdrawal under the

(1) 8 App. Cas. 235. (2) 11 App. Cas. 489.
(3) 11 App. Cas. 503.

rules. The advanced member still withdraws under the rules, though he does so by reason of the compulsion introduced by the winding-up; and here we have an instrument of dissolution which is equivalent to a winding-up. That being so, I do not think it necessary or proper to go into the matter further. The case of *London Provident Building Society* v. *Morgan* (1), decided in the Divisional Court, is very instructive, and not the less so because the learned Judges went into all the cases which had any bearing upon the point which they intended to decide. It is noticeable that in some of the cases, including that of *In re Britannia Permanent Benefit Building Society* (2), and the case which preceded it of *In re Middlesborough, Redcar, and Saltburn Building Society* (3), before Mr. Justice *Stirling*, the question was not whether the advanced member was liable to pay up at once, but whether he was liable as a contributory, or was merely a debtor, who, for the purpose of the winding-up, was to be treated as a stranger to the society. That is not the question which occurs here. The question is whether he is liable to make repayment now. I think that he is so liable.

Solicitors: *R. J. Jones & Co., Liverpool; Alfred Stephenson, Liverpool; W. Harper, Liverpool; Solly & Marshall, Birkenhead.*

(1) [1893] 2 Q. B. 266. (2) 65 L. T. (N.S.) 196; W. N. (1891) 123. (3) 58 L. J. (Ch.) 771.

C. C. M. D.

VAUGHAN WILLIAMS, J.

1894
May 3.

In re HARVEY'S OYSTER COMPANY.

ORMEROD'S CASE.

[00199 of 1893.]

Company—Shares—Underwriting Agreement—Winding-up—Contributory.

The Applicants, by an underwriting letter, agreed with the vendor to a company, in consideration of a commission, at any time within three months, "if and when called upon" by him, "to subscribe or find responsible subscribers for" a certain number of shares in the company, to be proportionally reduced in case the shares were partially subscribed for by the public. The agreement authorized the vendor, in the event of any underwriter "not subscribing or finding responsible subscribers as above mentioned," to subscribe for the shares in the underwriter's name, and to authorize the directors to allot the shares and register the underwriter's name in respect thereof:—

Held, that a request to the underwriters to subscribe or find responsible subscribers was a condition precedent to their being under liability to be treated as shareholders, and that as no such request had been made their names must be removed from the list of contributories in the winding-up of the company.

Ex parte Audain (1) distinguished.

JACOB ORMEROD and other persons each signed an underwriting letter for 1000 shares in *Harvey's Oyster Company, Limited.* The letters were addressed to *James Harvey*, who was alleged to be the promoter of the company, and were handed to him on the 25th of April, 1893; and each letter was in the following form:—

"Dear Sir,—I agree, for the consideration hereinafter stated, at any time within three months from the date hereof, if and as called upon by you, to subscribe or find responsible subscribers for any number of shares of £1 each of this company you may require, not exceeding 1000, in accordance with the terms of the prospectus dated the 8th of April, 1893, and to pay, or cause to be paid, the instalments upon the said shares in accordance with the terms of the said prospectus, in consideration whereof you are to pay me a commission of 5 per cent. in respect of each of the said 1000 shares.

"If, upon the publication of the said prospectus, the shares

(1) 42 Ch. D. 1.

offered to the public are partially subscribed for by the public, my liability is to be proportionally reduced, so that I shall only be bound to subscribe, or find subscribers, rateably with the other persons or firms who shall have underwritten the shares or any portion of the shares of the company; and if the whole of the shares so offered are subscribed for by the public, I shall be under no liability in respect hereof; but in any event I shall be entitled to receive the whole amount of the said commission upon the said shares, and the same shall be paid to me on or before the 1st day of August next.

"This agreement is to be revocable, and to be sufficient in itself to authorize you, in the event of my not subscribing or finding responsible subscribers as above mentioned, to subscribe for the said shares in my name, and to authorize the directors of the company to allot such shares to me and to enter my name in the company's register in respect thereof.

"It is a condition precedent of my liability to subscribe or find subscribers as aforesaid, that the said prospectus shall be properly issued to the public; that sufficient copies of such prospectus shall be printed and circulated among responsible persons."

No one ever called on any of the underwriters to subscribe or find subscribers for shares; but on the 27th of April, 1893, the shares were allotted to the underwriters, and their names were entered in the company's register of shareholders in respect of such shares, on the assumption that the letters gave authority to so enter the names. It was not shewn that any of the underwriters ever received any commission or made any payment in respect of shares.

One of the underwriters repudiated by letter his liability to take shares, and it was alleged that the others had done so verbally.

On the 6th of July, 1893, a petition was presented, on which, on the 31st of July, 1893, a winding-up order was made.

The liquidator placed the names of the underwriters on the list of contributories in respect of the shares allotted to them.

The underwriters took out a summons asking that the list of

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contributories, and the liquidator's certificate finally settling the same, might be varied by excluding their names therefrom.

Cane (*Gore-Browne* with him), in support of the summons:—

The underwriting letters were only offers to take the shares on certain conditions which were never fulfilled. The Applicants were to take shares or find subscribers if and as called upon to do so. They were never so called upon, and the letters were therefore not authorities to subscribe in their names: *Brussels Palace of Varieties* v. *Prockter* (1).

Harry Greenwood, for the liquidator:—

In *Brussels Palace of Varieties* v. *Prockter*, the authority was expressly limited to the event of the underwriter failing to apply when called upon. Here there was no condition precedent that the underwriters should be called upon to subscribe, or find subscribers, before being liable to be registered as shareholders. The letters were in effect applications for shares up to a certain number if not subscribed for by the public: *Ex parte Audain* (2).

VAUGHAN WILLIAMS, J.:—

I will not trouble you, Mr. *Cane*, for a reply. In my opinion, no authority was given by these gentlemen to make any application for shares in their names. If they gave no authority, they are in the same position as strangers whose names have been put on the register of shareholders without their consent—that is to say, they incur no liability. Under the underwriting letters the Applicants were liable within three months "to subscribe or find responsible subscribers" for a certain number of shares "if and as called upon." It is common ground that no request to subscribe or find responsible subscribers was ever made to any of them; but it is said that the letters were intended by them to be used as authorities to apply for shares in their names, although no such application had ever been made. I do not so read the letters. It seems to me that what was contemplated was that the underwriters should either subscribe for the shares or find responsible subscribers for them,

(1) 10 Times L. R. 72. (2) 42 Ch. D. 1.

but that, before they were put on the register, they should be called upon to do so, so that they might have an opportunity of finding responsible subscribers if unwilling to subscribe themselves. They were in fact to be called upon either to subscribe or to find responsible subscribers, in which case they might have been able to find some persons to subscribe. In *Ex parte Audain* (1) the question was, as here, whether a person who had signed an underwriting letter intended it to be used as an application for an allotment of shares. The Court seems to have had some doubt about it; but the postscript to the letter in that case shewed that it was so intended. The agreement there was to underwrite £10,000 A shares in the company on certain terms, and the postscript was as follows: "We further agree to pay the application money upon any balance of shares required to make up the 10,000 within one week's date." Lord Justice *Cotton* in his judgment said (2): "The postscript to the letter written by the appellant shews that he considered that what he had done amounted to an application, and that he himself treated the letter not only as a guarantee, but as an application for allotment, and in my opinion it must be regarded as an application to take the balance of the shares required to make up the £10,000." And, in my judgment, it was not intended by the Applicants in this case that their letters should be so treated, but only that they should be treated as authorities to the vendor to subscribe for shares in their names if they did not subscribe or find responsible subscribers if and when called upon to do so.

Solicitors: *Farmer, Gray, & Tottenham; E. C. Rawlings.*

(1) 42 Ch. D. 1. (2) 42 Ch. D. 6.

F. E.

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April 23, 24.

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[1893 I. 1062.]

Arbitration—Practice—Staying Proceedings in Action—Requiring Statement of Claim—"Step in Proceedings"—Rules of Supreme Court, 1883, *Order xx., r.* 1 (*b*)—*Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 4—*Unfairness of Arbitrator—Engineer of Company—Action extending to Matters not covered by the Submission.*

A notice by Defendant requiring a statement of claim is not a "step in the proceedings" which debars the Defendant from applying for a stay under the 4th section of the *Arbitration Act*, 1889.

The fact that a small portion of the relief claimed is not within the scope of the arbitration clause is not in itself a sufficient reason for refusing to stay proceedings where the main subject of the action is within the arbitration clause.

An arbitration clause referring disputes to the engineer of one party cannot be disregarded on the ground that the engineer is in substance a judge in his own case unless there is sufficient reason to suspect that he will act unfairly.

Judgment of *Kekewich*, J., affirmed.

THIS was an appeal from a decision of Mr. Justice *Kekewich* (1)

On the 22nd of July, 1889, the Defendant, *John W. Willans*, entered into a contract with the *Liverpool Overhead Railway Company* for the construction of a high level railway. The contract provided that any question or dispute arising between the parties out of the subject-matter of the contract should be referred to and decided by the company's engineers.

On the 24th of August, 1889, the Defendant entered into a sub-contract with the Plaintiffs, Messrs. *Ives & Barker*, for the erection and fitting up by them of the ironwork required for the railway. The sub-contract referred to the contract of the 22nd of July, 1889, as the principal agreement, and it was stipulated that the sub-contractor should do the work in such manner as should be determined and approved by the engineers and the contractor, and in accordance in all respects with the requirements of the principal agreement and of the specification of works therein referred to, so far as they were applicable. And

(1) [1894] 1 Ch. 68.

it was agreed that all questions arising from the sub-contract should be settled by the engineers in the manner mentioned in the principal agreement, and that the arbitration clause in the principal agreement should be treated as being therein repeated with the substitution of the names of the contractor and the sub-contractors for those of the company and the contractor.

The material clauses in these two contracts are more fully stated in Lord Justice *Lindley's* judgment.

On the 1st of July, 1893, the Plaintiffs issued the writ in this action against the Defendant, claiming a declaration concerning certain disputed questions arising out of the sub-contract, for specific performance of the agreement, for damages for breach thereof, and damages for delay in delivering materials.

The Defendant appeared in the action, and at the time of his entering appearance gave to Plaintiffs notice in writing requiring a statement of claim to be delivered.

On the 20th of July, 1893, at which date no statement of claim had been delivered, the Defendant took out a summons asking that pursuant to sect. 4 of the *Arbitration Act*, 1889, all further proceedings in the action might be stayed, on the ground that the matters in difference had been agreed to be referred to arbitration.

Mr. Justice *Kekewich* made an order staying all proceedings in the action, except as to certain claims in respect of matters which were outside the sub-contract. The Plaintiffs appealed.

The Plaintiffs filed affidavits in opposition to the Defendant's application, calling in question the fitness of the engineers named as arbitrators in their contract to decide upon the question in dispute in the action. The main points alleged were as follows: (1.) That the principal items in dispute were such that they would reflect discredit on the engineers, and shew negligence on their part; (2.) That circumstances had come to the Plaintiffs' knowledge which led them to the conclusion that the engineers were in collusion with the Defendant to throw expense on the Plaintiffs; but no specific facts were alleged; (3.) That the Plaintiffs had complained several times to the engineers of defective material supplied to them under the contract, but the engineers had treated their complaints as frivolous, and had

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approved and passed the materials; (4.) That the engineers had appointed an inspector of materials who was inefficient; (5.) That the engineers and the Defendant were jointly interested in promoting an underground railway in *London*.

The Defendant filed affidavits denying collusion with the engineers, and stating that the materials passed by the engineers were not defective, and that the inspector appointed by them was an efficient and impartial man. It appeared that the only matters in dispute alleged in the statement of claim which were not covered by the arbitration clause in the contract, related to some material called "decking," which the Plaintiffs had taken to and removed from the works of the *Phœnix Foundry Company* at their own expense, and in respect of which they claimed £86 from the Defendant.

Renshaw, Q.C., and *A. F. Peterson*, for the Plaintiffs:—

The notice requiring the delivery of a statement of claim was an election by the Defendant that the action should proceed and the question at issue be decided by the Court. It was given under one of the Rules of the Supreme Court, 1883, Order xx., rule 1 (*b*), and was a formal step in the proceedings under sect. 4 of the *Arbitration Act*, 1889, and the Defendant cannot now retract his election: *Adams* v. *Cattley* (1); *Clough* v. *London and North Western Railway Company* (2); *Scarf* v. *Jardine* (3); *Chappell* v. *North* (4). It is, therefore, now too late for the Defendant to apply to the Court to refer the matter in question to arbitration.

But supposing the application is not too late, it is not one which the Court, in its discretion, ought to accede to. The arbitrators named in the contract are the engineers of the company, and are, from this very position, disqualified from acting as arbitrators, and in judging of the quality of the material and the sufficiency of the work, they cannot help being biassed in favour of the company and of the Defendant, who, in the sub-contract with the Plaintiffs, stands in the place of the company. But, beyond this, we shew by the affidavits which have been filed, that there are special circumstances in this case which

(1) 40 W. R. 570.
(2) Law Rep. 7 Ex. 26.
(3) 7 App. Cas. 345.
(4) [1891] 2 Q. B. 252, 256.

incapacitates the engineers from acting as arbitrators. The complaints made by the Plaintiffs reflect upon the credit of the engineers, and they cannot be judges in their own cause. They have, moreover, already passed and approved most of the material which the Plaintiffs allege to be defective, and refused to listen to the Plaintiffs' complaints; they have, therefore, prejudged the question at issue in the action. There is also cause for suspicion that they were colluding with the Defendant, and were jointly concerned with him in another enterprise: *Jackson* v. *Barry Railway Company* (1); *Nuttall* v. *Mayor of Manchester* (2); *Lawson* v. *Wallasey Local Board* (3).

There is a further reason why this application should not be granted, namely, that the submission to arbitration in the contract does not cover the whole of the matter in question in the action. We may specially mention the dispute as to the decking. It is true that is comparatively a small matter, but it is sufficient to support the action, and the Court cannot stay the proceedings without deciding that point: *Turnock* v. *Sartoris* (4).

[LINDLEY, L.J.:—We do not wish to hear counsel for the Defendant on the point of practice relating to the step in the proceedings.]

Warmington, Q.C., and *Bramwell Davis*, for the Defendant:—

The Plaintiffs cannot now complain of the engineers acting as arbitrators. When they entered into their contract they well knew who the arbitrators were to be, and they knew that they were also arbitrators in the previous contract between the Defendant and the company. They were acquainted with the high character borne by the engineers, and their great experience in their business, and were satisfied to trust them, as the Defendant had been in his contract. The engineers of large companies are usually men of eminence, and it is very often found convenient for both parties to agree to have them as arbitrators. The Plaintiffs cannot now object to their acting unless they can prove some *mala fides* or misconduct. They have proved nothing of the kind. The allegations of collusion are most vague and

(1) [1893] 1 Ch. 238, 243.
(2) 8 Times L. R. 513.
(3) 11 Q. B. D. 229.
(4) 43 Ch. D. 150.

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unreasonable, and are supported by no evidence. With respect to the charge of their having already passed materials which the Plaintiffs allege to be defective, it was within the scope of their duty as engineers to do so, and if they were acting *bonâ fide* it is no ground for objection against them. If the Plaintiff can now shew any defect in the materials, the arbitrators would be bound to reconsider their decision, and there is no ground for saying they would not be willing to do so: *Jackson* v. *Barry Railway Company* (1); *Eckersley* v. *Mersey Docks and Harbour Board* (2). With respect to the claim for the decking, the amount of damage claimed is very small. If the matters not covered by the submission to arbitration formed the principal part of the cause of action the Court might hesitate to refer them to arbitration under the 4th section of the *Arbitration Act;* but here all the principal matters complained of are capable of being referred, and the action may well be stayed as to them, and proceed as to the small matters which remain, which would probably be easily settled between the parties.

Renshaw, in reply.

LINDLEY, L.J.:—

This is an appeal from the decision of Mr. Justice *Kekewich,* staying proceedings in this action, and in substance referring the matters in dispute to arbitration under sect. 4 of the *Arbitration Act,* 1889. The application was made by the Defendant, and the Plaintiffs' grounds for appealing, are three. First, they say that the application to stay was too late, because the Defendant had taken a step in the action. There are other grounds of complaint that go to what I may call the merits of the case. They impeach the fairness of the arbitrators; that is their second point. Their third point is this, that inasmuch as the whole of the action is not referred to the arbitrators, no part of it ought to be referred by the Court in the exercise of its discretion. Now, in order to deal with these points I will read the section, because a great deal turns upon that. Sect. 4 runs thus—I will read it shortly, omitting words im-

(1) [1893] 1 Ch. 238, 243. (2) [1894] 2 Q. B. 667.

material to the present purpose: "If any party to a submission commences any legal proceedings in any Court against any other party to the submission in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that Court to stay the proceedings, and that Court or the Judge thereof if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the Applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

Now, as to the first point, viz., that the application was too late, the facts are these. The Plaintiffs issued their writ against the Defendant; the Defendant entered an appearance, to the præcipe, and by a formal document he required a statement of claim. That was contemporaneous with the entry of the appearance. Then he wrote a letter to the Plaintiffs' solicitors, saying that he should desire a statement of claim. That is all he did. He took no other steps before he made this application for a stay under the section to which I have referred. The contention on the part of the Plaintiffs is this: that the Defendant was too late because he asked for, or gave notice that he should require, a statement of claim, and that is said to be the taking of a step in the proceedings. Now the language of the section requires a little attention. It is quite obvious that the step to be taken must be a step to be taken by the applicant. It is not before any pleadings are delivered by anybody or any step is taken by anybody, but it is before the party applying delivers any pleadings or takes any other steps; and, therefore, the question we have to consider is narrowed down to this: whether a request by one party to another to take a step is taking a step himself. That is what the Defendant did. He asked the Plaintiffs to take a step, to deliver a statement of claim. I cannot say that is taking a step in the proceedings which precludes the Defendant making the application, and I do not think it would be good sense if we held

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that it was. Consider what the Defendant did? He had received a writ and the writ shewed him that there was a claim for breach of contract. That he knew what the contract was I do not doubt, but he did not know from the writ what the particular breaches were in respect of which the Plaintiffs were suing him, and, until he did know that, at all events, how was he to form an opinion as to whether it would be desirable to apply for an order or not? He had not the materials before him to enable him to exercise his judgment in the matter, and it appears to me, therefore, that we should be doing an injustice to a defendant if we said that he must apply under the section for an order to refer before he knows what the plaintiff is suing him for. Quite apart from the case not being within the words, therefore, it is not within the spirit or the sense of the Act. Before a man can make up his mind as to which of the alternatives he will take, he ought to know what the alternatives are, and ought to be in a position to exercise some kind of judgment in the matter, and if we were to hold that the Defendant ought to have applied before, we should be saying that he should make his application in ignorance of material facts.

The authorities shew that a step in the proceedings means something in the nature of an application to the Court, and not mere talk between solicitors or solicitors' clerks, nor the writing of letters, but the taking of some step, such as taking out a summons or something of that kind, which is, in the technical sense, a step in the proceedings.

Now, I pass to the next point, which goes to the merits of the case. It is an attack on these arbitrators. In order to deal with that, it is of the utmost importance that we should see what is the agreement between the parties, which is comprised in what is called the sub-contract of the 24th of August, 1889, made between *Willans* the Defendant and the Plaintiffs *Ives & Barker*, which sub-contract refers to a principal contract of an earlier date, made between the *Liverpool Overhead Railway Company* of the one part, and *Willans* of the other part. It is impossible to understand the sub-contract without referring to the principal contract, which is referred to in the sub-contract itself. The principal contract is for the construction of the

Liverpool Overhead Railways, and it is made, as I have said, between the *Liverpool Overhead Railway Company* of the first part, and *Willans*, the contractor, of the other part; and by this principal contract *Willans* contracted to make these *Overhead Railways*. The 4th clause is this:—"The works shall be executed in compliance with the provisions hereinafter contained and with the best materials and workmanship and in the most workmanlike manner and to the satisfaction in all respects of the company's engineers for the time being and of the Inspecting officer of the Board of Trade." Then there are further references to the plans and specifications and sections; and then there is power to the engineers to order the removal of improper materials; and then there is the usual arbitration clause, which I will read:—"If any question difference or dispute shall arise between the company and the contractor, touching the construction or meaning of anything contained in these presents or in the said specification, plans, or sections or any of them, or as to any works, plant, material, matters or things, which the company shall require the contractor to execute do or supply under or by virtue of these presents or as to any extra or additional or supplemental works which may be so ordered by the engineers as aforesaid or as to the price to be paid by the company and the contractor or as to any monies alleged to be payable by the company to the contractor or by the contractor to the company or as to the rights duties liabilities or obligations of either party under or by virtue of these presents or as to any other matter or thing in any way arising out of or relating to the premises the matter or difference shall be referred to the engineers whose decision thereon shall be final and conclusive on both parties." Now, that is a very stringent provision, and one is surprised at first that any contractor should submit to be bound so tightly, because we know perfectly well, that a dispute between the contractor and the company is in substance in this business a dispute between the contractor and the engineer whose business it is to see that the works are done for the company according to the agreement and the plans and specifications; so that the real agreement between the contractor and the company is this, that if there is any dispute between them,

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although the engineer is to tell the contractor what to do and order him to do what he likes consistently with the agreement, his decision must be final. Now, what is the real explanation of that? How does it happen that a man will agree to be bound by such a very stringent provision? The explanation of it is to be found in two circumstances. First of all, competition for this kind of work is very keen, and contractors compete with each other; and, in the second place, it has been ascertained by long experience that engineers of the highest character may be trusted, and, when a contractor enters into such a very stringent provision as this, he knows the man he has to deal with. I take it that a contractor such as Mr. *Willans* would not submit to be bound by a clause of that kind unless he had confidence in the engineers, and unless the engineers were persons of the highest character. If he had not confidence he would not submit to it; but knowing the engineers he does submit to it, because he has confidence in them and knows that they can be trusted, even although it is their duty to look after the work of the contractor, to deal fairly with him in case of a dispute which is in substance, although not in form, a dispute between the contractor and themselves.

The sub-contract arises in this way. *Willans* agreed to make these works, but found it necessary to enter into sub-contracts with other people—with some to make the things required; with others, as in this particular case, not to make the things, but to put together the things which were made; and the sub-contract with which we have to deal, and which was entered into between *Ives & Barker* of the one part and *Willans* of the other, refers to this original contract. It recites that, "Whereas by an agreement (hereinafter called the principal agreement) a copy of which and of the specification of works scheduled thereto has for the purpose of identification been signed by or on behalf of the parties hereto and is intended to be hereunto annexed the contractor has contracted with the said *Liverpool Overhead Railway Company* to construct so far as described in the principal agreement an overhead or high level railway. And whereas the erection painting and tarring comprising the setting out carting putting together rivetting erecting

painting and tarring of the wrought and cast iron work steel and other work mentioned in the schedule hereto forms part of the work which by the principal agreement the contractor has undertaken to provide or do." Then it is witnessed that it was agreed as follows, "The sub-contractors shall for the contractor at their own cost by their own workmen appliances, &c., and in such manner times and by such tools appliances &c. as shall be determined or approved by the engineers and the contractor and in accordance in all respects with the requirements of the principal agreement and of the specification of works therein referred to, so far as they respectively apply to the works of the description now in question, set out all the foundations and also take to all the wrought and cast iron work steel and other work and materials therefor mentioned in the schedule hereto at the station at *Liverpool* as such are delivered from the manufacturers in accordance with their drawings specification and contract, load up cart unload &c. and erect fix and rivet in place test paint tar and finish the same complete" at the price therein specified. Then there is this clause, "Care will be taken to have the work made at the manufacturers' works in such a way as to make all the parts as accurate and as nearly interchangeable as is reasonably possible in such work and any suggestions on these points from the sub-contractors will have consideration—but it is understood that subject to such care the sub-contractors take to the work as delivered by the manufacturers at *Liverpool* and at their own cost correct and adjust any ordinary imperfection of workmanship, the intention being that under this contract the sub-contractors shall take the work as and in the condition in which it is delivered by the manufacturers ready for erecting according to specification, the method of manufacture and the conditions in which the work is to be delivered being at this time known to them." Then there is the arbitration clause: "All questions arising from this agreement shall be settled by the engineers in the manner mentioned in the principal agreement and the arbitration clauses contained in the principal agreement shall be treated as being herein repeated with the substitution only of the names of the contractor and sub-contractors for those of the company and the contractor." Now, pausing

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there for a moment, let us see what that agreement really amounts to. What is it that the sub-contractors agree to when they sign and enter into that sub-contract? They agree to be bound in all disputes between them and the contractor, that is *Willans*, by the decision of the engineers of the company. They knew the arbitration clauses contained in the original contract, and they knew what the duties of those engineers were, and they knew that amongst other duties was that of passing or rejecting the materials. The sub-contractors agreed to put up the materials which were to be supplied, relying upon the honour and character of the engineers to reject such as were unfit, and they were willing, as the contractor himself was willing, to submit any difference between them and the company, which indirectly is really a difference between them and the engineers to the arbitration of those engineers themselves. That is what is contemplated, and that is the substance of the bargain.

If that is so, what must the sub-contractors not only allege but prove, in order to make out that, in a dispute between them and *Willans*, the contractor, these engineers, as arbitrators, are not proper persons to decide that dispute? It is obvious that the sub-contractors must prove a great deal more than that the engineers have formed an opinion already upon the subject of the dispute. They must attack the character of the engineers to such an extent, and in such a manner, as to shew that the engineers will probably be guilty of some misconduct in the matter of the arbitration; that they will not act fairly. That is really what the evidence must establish. Having chosen to put themselves in that position, the sub-contractors cannot complain of the legitimate consequence of their bargain; but they could complain of the illegitimate consequence, and if it were true that these engineers were in collusion with the contractor so as to act unfairly, or so as to lead the Court to suppose that they would act unfairly, there would be some ground for saying that this arbitration clause ought not to be enforced. But having heard the evidence read, I am of opinion that there is really no evidence which deserves serious consideration so far as collusion is concerned. It is said that these contractors and these engineers are co-promoters of companies. That is an allegation which

may amount to anything and may amount to nothing, and we cannot entertain such a loose statement as that.

A much more definite statement is that the contractors and engineers have precluded themselves from acting justly because they have already passed improper materials. Now, if there was any reason whatever to suppose that the engineers had passed materials which they knew and believed to be unfit, that would be a very serious charge indeed; but the charge does not come up to that, or anything like it. The charge is put in this way: "We, the sub-contractors, complained to you that some girders and other things were unfit; you treated our complaint as frivolous." What does that mean? It means that the engineers did not think they were unfit. That is precisely one of the very things which the sub-contractors contemplated and agreed to submit to. It was the engineers' duty to exercise their own judgment, and any difference of opinion must of course be accepted. The sub-contractors must go far beyond that in order to convince the Court that these engineers are not men who ought to be trusted after the trust and confidence which has been put in them deliberately by the sub-contractors themselves. That part of the case seems to me to break down almost, if not quite, as conclusively as the part relating to the suggestion of collusion and impropriety.

Then, the third point is this. It is said that the language of this section in the *Arbitration Act*, 1889, only gives power to stay the proceedings. The language is, "The Court, if satisfied that there is no sufficient reason why the matter should not be referred, may make an order to stay proceedings." It is said that inasmuch as you cannot refer the whole action there is no power to refer any part of it. It is all or none, and the case which was referred to of *Turnock* v. *Sartoris* (1), it is said, goes to support that view. Now, the matters which are to be referred under the 4th section are matters which are agreed to be referred, and if matters which are agreed to be referred are mixed up in an action with matters not agreed to be referred there is no reason why the 4th section should not be applied to those matters which have been agreed to be

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referred, leaving the action to go on as to the other matters. But I quite see that if the matters agreed to be referred were not the main matters in dispute, but were of a subordinate and trifling nature, and if the matters not agreed to be referred were the main matters in dispute, it would be very inconvenient, to say the least of it, to refer that small part and let the action go on as to the large part. That was the case in *Turnock* v. *Sartoris* (1), but that is not the case here. The position is reversed. The great controversy is as to the matters which have been referred, and the matters which have not been referred are comparatively small, and I see no reason at all why those matters which have been referred should not be referred, and the action go on as to the rest, if it is found worth while to go on with it.

The decision of the learned Judge was right and must be affirmed, and the appeal must, therefore, be dismissed with costs.

LOPES, L.J.:—

I am of the same opinion. The first point made is that this application is too late under the 4th section of the *Arbitration Act*, 1889, and the real question which is raised is this: whether or not asking for a statement of claim is a step in the proceedings within the meaning of this section. I am clearly of opinion that it is not. In this case the writ was issued for specific performance and for damages, and the Defendant entered an appearance and simultaneously asked for a statement of claim. The words of the section are to be looked at, and I will read them shortly:—"If any party to a submission commences any legal proceedings in any Court against any other party to the submission"—then come these words—"in respect of any matter agreed to be referred." Now, these words "in respect of any matter agreed to be referred" appear to me to be important, because I think all that the Defendant really did here was this. He has a writ before him of a very general kind, and he naturally says to himself—"There is a submission in respect of certain matters which were agreed to be referred, and when I look at this writ it is very general, and I cannot tell how much of the claim in this action comes within this submission

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to refer, and how much on the other hand is outside it;" and he naturally applies for a statement of claim, in order thereby more definitely to ascertain for himself what is within the submission and what may be outside it. For what purpose does he do that? In order that when he knows, he may then elect what course he shall take; whether in point of fact he shall do that which will be a step in the action, or whether he shall forbear. Now I do not think that an application of that kind for a statement of claim is a step in the proceedings within the meaning of this section. Therefore the learned Judge was perfectly right in the view which he took on that part of the case.

But then another and an important part of the case is this. It is said that these engineers, as arbitrators, are not to be trusted, and it is submitted that the arbitration should not be allowed to proceed. It must be borne in mind that these are not arbitrators in the ordinary sense of the word. They are arbitrators chosen and selected by the parties, selected with the knowledge that to some extent they must have an interest in the direction of their employers. It is well known they must have it, and I think the words of Lord Justice *Bowen* in the case of *Jackson* v. *Barry Railway Company* (1), at the commencement of his judgment, are highly instructive as to what the position of engineers or arbitrators is in a case like the present. He says: "It was an essential feature in the contract between the plaintiff and the railway company that a dispute such as that which has arisen between the plaintiff and the company's engineer should be finally decided not by a stranger or a wholly unbiassed person but by the company's engineer himself. Technically, the controversy is one between the plaintiff and the railway company; but, virtually, the engineer, on such an occasion, must be the judge, so to speak, in his own quarrel. Employers find it necessary in their own interests, it seems, to impose such terms on the contractors whose tenders they accept, and the contractors are willing, in order that their tenders should be accepted, to be bound by such terms. It is no part of our duty to approach such curiously coloured contracts with a desire to upset them or to emancipate the contractor from the burden of a stipulation

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which, however onerous, it was worth his while to agree to bear. To do so, would be to attempt to dictate to the commercial world the conditions under which it should carry on its business. To an adjudication in such a peculiar reference, the engineer cannot be expected, nor was it intended, that he should come with a mind free from the human weakness of a preconceived opinion. The perfectly open judgment, the absence of all previously formed or pronounced views, which in an ordinary arbitrator are natural and to be looked for, neither party to the contract proposed to exact from the arbitrator of their choice. They knew well that he possibly or probably must be committed to a prior view of his own, and that he might not be impartial in the ordinary sense of the word. What they relied on was his professional honour, his position, his intelligence." Every word of that judgment appears to me to apply to the present case.

I will deal shortly with the two main attacks which are made against these engineers and arbitrators. I think the chief one is this. It is said that they are not fit to be trusted, because they have prejudged a certain question with regard to the action, the quality and fitness of certain materials. The answer to that, to my mind, is this: that the parties perfectly well knew, when they consented that these engineers should be arbitrators, that difficulties such as these which are now suggested might arise; they perfectly well knew that these engineers were the persons who were to determine the quality and character of the materials in question; they knew that these engineers had to do that as well as to act as arbitrators in what is termed the larger arbitration. Knowing that, they agreed that they would accept the arbitrators, and it appears to me now that they cannot turn round and say that, because their judgment is erroneous, therefore they are not bound to accept it. They agreed to be bound by their judgment, however erroneous it might be, provided it was honest, provided it was not tainted with fraud or with misconduct. Now, as far as I can collect, it cannot be suggested that the engineers have acted fraudulently, nor can I find any evidence of any misconduct on their part. If a case of this kind could have been made out that the engineers perfectly well knowing that these materials were improper, with that knowledge passed them,

that, to my mind, would have been strong ground for assenting to the application which Mr. *Renshaw* is now making; but there is nothing of the kind. It may be, and probably is so, that they gave a perfectly competent judgment; but even if they did not, that is no ground whatever, having regard to the peculiar nature of this arbitration, for stopping the arbitration.

Now, another ground is made, which is this: It is said that the arbitrators could not behave properly, because a question of their competency may be involved. I think that is entirely disposed of by the recently-decided case of *Eckersley* v. *Mersey Docks and Harbour Board* (1), the judgment in which was read from the shorthand notes.

Another attack is made upon them on the ground of collusion. It is said that the engineers and the Defendant are acting in collusion. All I can say with regard to that is, that that charge is so wild and so vague, and in respect of it there is so little that is conclusive, that I desire to adopt the view that they have acted not at all in that way; and I think that ground fails also.

In my opinion, therefore, the decision of the learned Judge was right, and I think this appeal ought to be dismissed.

KAY, L.J.:—

I also agree with the decision of the learned Judge, and I agree entirely with the judgments that have been pronounced in this Court, particularly with the very careful judgment of Lord Justice *Lindley*, and I should say nothing in the matter at all, but that I think it involves a decision on some very important questions, to which I can hardly be content to give my silent assent.

As to the first question, Whether requiring a statement of claim is taking a step in the action within the meaning of sect. 4 of the *Arbitration Act*, I am very clearly of opinion that it is not, for reasons which have already been given, and particularly for this reason: When a writ has been issued, however carefully it is endorsed, it may very well be that the defendant who is sued may not completely understand from the writ what the entire scope of the action is. Mr. *Renshaw's* argument—and I agree

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with the argument—is that he has to exercise an election whether he will allow the action to go on or avail himself of an arbitration clause like that in the agreement now before us, and apply to the Court to stay the action. But it is essential to every case of election that a man who is put to election shall thoroughly understand the facts which make it necessary for him to elect. In this case what the Defendant did was, in the first instance, to require that a statement of claim should be delivered. He did so simultaneously with giving notice of his having entered an appearance in the action; but he did not wait till the statement of claim was delivered, but took out this summons to stay proceedings in the action under the arbitration clause, and the consequence is this. When the scope of the action became apparent, upon the argument of the case, it was found that he had gone too far; that he did not thoroughly understand what the scope and extent of this action was, and he included in his motion to stay the part of the action which referred to a matter which was outside the agreement containing the clause of arbitration. Nothing could shew more clearly how improper it would be to say that requiring a statement of claim, which would shew the defendant what the scope of the action was more clearly and definitely than he could make out from the writ, would be the taking of such a step in the action as would debar him from exercising the election which he ought only to be bound to exercise when he thoroughly understands what the nature of the action against him is. I, therefore, think that the learned Judge on that point was entirely right in deciding that it was not a step in the action within the meaning of the 4th section of the *Arbitration Act.*

The other points are of vastly more importance. It seems to be a custom now—I suppose it is inveterate—that in large contracts of this kind, the engineers who are employed to watch the contractors on behalf of the company which is undertaking the great work, should be named as the arbitrators between the employers and the contractors if a dispute should arise. One can see, and the course of decisions of late years in this Court has shewn it, that that must lead now and then to questions of difficulty between the two contracting parties. To make

the engineers, who are employed by the persons who engage the contractors to do the work, the arbitrators of every question that arises between the two contracting parties must put those engineers sometimes into a very difficult position indeed. But, in this Court, we have to deal with the practice, which has become, as I have said, almost inveterate, and is a thing which contractors and employers thoroughly understand, which they are entirely accustomed to, and which nothing that we can say would in the least alter or do away with.

Now, what is the course which this Court ought to take as a matter of business in questions of this kind? Here is this kind of practice thoroughly understood and acted on from day to day, and contractors who enter into contracts of this kind know very well that the engineers are put into a position which makes them for some purposes not the most proper arbitrators that could be selected. They know perfectly well that the engineer is employed by the other party to the contract; that he has to watch the work that is done; that he has, as is quite usual in contracts of this kind, to determine whether the materials are good or not, to determine whether the work is or is not properly done; and any question that might arise between the two contracting parties would probably be a question which the engineer in the course of his employment as engineer had already had before him and had to consider, and had to form some judgment upon: and with that knowledge the contractor does enter into this kind of contract, does agree that the engineer shall be the person whose decision upon the questions that arise between him and his employer shall be absolutely final, that he shall be put into the position of arbitrator and judge from whom there is no appeal whatever. Now, I have no doubt, that is done for the reasons already indicated by Lord Justice *Lindley*, mainly, I think, because engineers who are put into that kind of position are persons of known integrity, far above any suspicion of improper dealing, and the contractor is content to be bound by the decision of an arbitrator who is in a position of very considerable difficulty. Also, I dare say, the other motive which Lord Justice *Lindley* referred to has very much to do with it, namely, that competition is so keen that

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railway companies and great employers of labour, and other persons who have large works to put into the hands of contractors, find that they have no difficulty in obtaining contractors who are willing to submit to such terms. Now, in this case, there has been, first of all, the faintest possible suggestion, not supported by an atom of anything like proof, of collusion between the engineers, who are celebrated men, and the Defendant to this action, who was the original contractor, the Plaintiffs being the sub-contractors. I disregard entirely the suggestion that has been made upon that point, because I do not think it comes to more than a mere suggestion, and I think there would be the greatest possible danger of involving persons who employ contractors in interminable litigation if an arbitration clause of this kind could be set aside upon a mere suggestion such as that which I am now dealing with. I think that that is entirely out of the question, and I am sorry that upon such very insufficient materials any such suggestion should have been made.

The most material thing, as it strikes me, which has been put forward in order to shew that the engineers are not proper arbitrators in this case is this. It is said that these engineers have, in the exercise of their duty as engineers, approved and passed various materials in iron, which the sub-contractors, by the terms of their sub-contract, were bound to put together in order to construct the *Overhead Railway*, which is the subject of the contract. And it is said that, having already approved these materials they are the last persons in the world who should be made arbitrators in a question as to whether the materials were good or not. Now, that, I confess, struck me as being the strongest point that was made by the Plaintiffs in this case, and they confirmed their evidence on that point by specifying the dates of letters which they had written to the engineers complaining of the quality of some of the iron materials furnished; and, besides that, they said they had in numerous instances, made verbal representations to the same effect, but that all these representations had been treated by the engineers as frivolous, that is to say—I am putting it as I understand the argument was—that the engineers had, in each one of these instances, exercised their judgment against the Plaintiffs,

and in such a manner as to make them most unfair arbitrators in a question as to the sufficiency of those materials which they had already approved and passed. But then one must look back at the contract, and I find on looking back at the contract it seems to me to have this effect. In the original contract the materials for the construction of this railway were to be such as the engineers should approve, and their approval was made by the terms of the contract between the contracting parties, the company who are forming the railway and *Willans* the Defendant in this action, sufficient and conclusive. So that in the absence of *mala fides*, if the engineers did approve the materials, there was an end of the matter, and the contractor was entirely bound by that approval. In the sub-contract, the original contract, to that extent, is adopted, and the sub-contractors, who had not furnished any materials themselves, but had only to put together the materials which were furnished to them, took these materials from *Willans*, the person with whom they contracted, and took them upon the terms of the original contract, namely, that they are to be materials which the engineers had approved as between *Willans* and the company. Therefore, again, as between Messrs. *Ives & Barker* and *Willans* the approval by the engineers of the quality of the materials is to be a binding thing; and, supposing the question were attempted to be raised before an arbitrator, who was a third person altogether, whether the materials were good or not, and it was proved in the absence of any such *mala fides* or misconduct that the engineers had approved and passed these materials, then I think the arbitrator would not go behind their approval for a moment, but he would say that, according to the contract, that is to be sufficient evidence that the materials were proper and right; and I think that no judge and no arbitrator would allow evidence in the absence of some suspicion of *mala fides* or misconduct to shew that that approval of the engineers was at all improper and that the materials, notwithstanding that approval, were not good and sufficient. That is one answer. The other answer is this: That these parties with their eyes open entered into this contract; they agreed that the engineers' approval of the materials should be sufficient as between the contracting parties; and they agreed that in

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any question that arose which was submitted to arbitration, those engineers should be the arbitrators. Now after that agreement, when they turn round and say, we cannot accuse you of having acted dishonestly, we can only say that you approved of the materials, and we allege that those materials were not good notwithstanding your approval, and therefore you cannot properly sit as arbitrators, they are not fulfilling that obligation which is incumbent upon them, namely, to make out that those arbitrators, to use the language of the Master of the Rolls in the case of *Eckersley* v. *Mersey Docks and Harbour Board* (1) would be so biassed when they come to exercise their duty as arbitrators that they are unfit to sit in that position.

With respect to the rest of the case, I have very little indeed to add. It is said that there is sufficient reason for not allowing this arbitration to go on in the fact that the action must proceed as to a very small part of it. I agree entirely with the observations that have been made, and I have no doubt that is a matter which the Court should regard; but looking at how much of this action is allowed to go on, and seeing what a very small part indeed it is of the question which has been raised between the parties, and seeing that it relates merely to a comparatively small question which was not included in the agreement which contains this arbitration clause, I do not think that there is sufficient reason here on that ground to prevent the arbitration going on.

On the whole, though I feel very much impressed by the difficulty of the position in which these arbitrators are placed by reason of their being both arbitrators and engineers of the company which is forming this overhead railway, I do not think that a sufficient case has been made out for allowing the action to go on, and I think the learned Judge was right in the conclusion at which he arrived. Therefore, I think this appeal should be dismissed.

Solicitor for Plaintiffs: *J. Kirkley*, agent for *Davidson & Barker, South Shields.*

Solicitors for Defendant: *Addleshaw, Warburton, & Trenam*, agents for *Addleshaw & Warburton, Manchester.*

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M. W.

LESLIE *v.* EARL OF ROTHES.

[1893 L. 2686.]

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KEKEWICH, J.
March 13.
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May 8.

Will—Construction—Shifting Clause—"Possession or receipt of Rents and Profits"—Management by Trustees.

A testatrix devised a freehold dwelling-house and land to the sons of her niece successively for life, with remainder to their respective sons successively in tail, with a proviso that during such time as any person who (if that proviso had not been inserted) would for the time being be entitled to the possession, receipt, or enjoyment of the rents and profits of the hereditaments as tenant for life or tenant in tail by purchase, should be under the age of twenty-one years, the trustees of the will should enter into the possession or receipt of the rents and profits of the hereditaments, and manage the same and pay the expenses of management and other outgoings, and should pay such sums as they should think fit towards the maintenance and education of such minor and should apply the residue of such rents and profits upon the trusts declared of the residuary personal estate. Then followed a proviso that if any person for the time being entitled to the possession or to the receipt of the rents and profits of the said hereditaments should succeed to the title of Earl of *R.*, then the hereditaments should go and remain to the uses and for the trusts to and upon which the same premises would have stood limited and settled under the will, if the person who should so succeed to the title were dead without issue. The Defendant became tenant in tail by purchase under the limitations of the will, being under the age of twenty-one years; and a few years afterwards, being still an infant, he succeeded to the title of Earl of *R.*:—

Held (affirming the decision of *Kekewich*, J.), that having regard to the proviso for the possession and management of the estate by the trustees during minorities, and to the use of the words "possession or receipt of the rents and profits" in other parts of the will, the Defendant, on succeeding to the title of Earl of *R.*, was not in possession or in receipt of the rents and profits of the premises, and therefore the shifting clause did not take effect.

LADY *Elizabeth Jane Wathen*, by her will, dated the 29th of July, 1859, devised a freehold dwelling-house and hereditaments at *Dorking* to the use of *Martin Leslie Haworth*, the eldest son of her niece *Mary Elizabeth Haworth*, during his life, with remainder to his first and other sons successively in tail, with remainder to the third son of her said niece (passing over the second son) for life, with remainder to his first and other sons successively in tail, with remainder to her fourth and fifth sons successively for

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their respective lives, and to their respective sons successively in tail, with remainder to trustees to preserve the contingent remainders upon trust "to permit the rents, issues, and profits of the said hereditaments to be received and taken from time to time by the person who, if the said *Mary Elizabeth Haworth* were dead, would for the time being be entitled to the possession or receipt of the same rents, issues, and profits under the limitations hereinafter contained."; with remainder to the sixth and other sons of the said *M. E. Haworth* for their respective lives and their respective sons successively in tail, with an ultimate remainder to the right heirs of the testatrix.

The will contained a proviso that every male person who under or by virtue of the limitations of the will should become beneficially entitled to the possession or to the receipt of the rents and profits of the said hereditaments thereinbefore devised should within the space of one year next after he should become entitled, if he should be then of full age, or if he should be under that age then within one year next after he should attain such full age, take upon himself and use on all occasions the surname of *Leslie* and no other surname, and also take and bear the arms of *Leslie* and no other arms; or if such person should be or become a peer, then the surname of *Leslie* with the title of his peerage and the arms of *Leslie* quartered together with the armorial bearings belonging to his peerage; and also should within the space of one year next after he should become so entitled as aforesaid, or next after he should attain his full age as aforesaid, as the case might be, apply for a license from the Crown to authorize him to take, use, and bear the surname and arms of *Leslie* in manner aforesaid. And the testatrix declared that in case of default the limitation of the hereditaments to the person so making default should cease and become void, and the said hereditaments should devolve on the person next in remainder under the limitations of her will. Provided also and the testatrix further declared, that during such time as the said *Martin Leslie Haworth* should be under the age of twenty-five years, or as any person who under or by virtue of her will would (if this present proviso had not been inserted) for the time being be entitled to the possession, receipt, or enjoyment of the rents,

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issues, and profits of the hereditaments therein before devised as tenant for life or tenant in tail by purchase, should be under the age of twenty-one years, then and in such case, and so often as the same should happen, the trustees of her will should enter into the possession or receipt of the rents, issues, and profits of the said hereditaments, and should during such time or minority hold and continue such possession or receipt of rents, issues, and profits, and manage or superintend the management of the same hereditaments; with full power to fell timber from time to time for repairs or sale, and to repair the said dwelling-house, hereditaments, and premises, and keep the same insured against damage by fire, and from time to time during such possession should by and out of the rents, issues, and profits of the same hereditaments, or, if the same should be insufficient, by and out of any other moneys which should come to their hands under the trusts thereinafter declared concerning her residuary personal estate, pay the expenses of such management, repairs, and insurance, and all other outgoings relating to the said hereditaments, and subject thereto should pay such sum as the said trustees should think fit for or towards the maintenance or education of the said *M. L. Haworth* or of such minor as aforesaid (either directly or to his guardian or guardians), and should stand possessed of the residue of the said rents, issues, and profits upon such trusts as were thereinafter declared of and concerning the capital of her residuary personal estate, or such of them as should be then subsisting and capable of taking effect. The will then contained a power to tenants for life beneficially entitled if of full age, and to the trustees during the minority of any person who, if of full age, would be entitled at law or in equity to the possession or to the receipt of the rents and profits of the said hereditaments and premises, to let all or any of the said hereditaments and premises for twenty-one years. And then followed this proviso: "Provided always and I hereby declare, that if any person for the time being entitled to the possession or to the receipt of the rents and profits of the said hereditaments and premises herein devised shall succeed to the title or dignity of Earl or Countess of *Rothes*, then and in such case and immediately thereupon, and as often as the same shall happen,

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the said hereditaments and premises shall go and remain to the uses upon and for the trusts and with such and subject to the powers, provisoes, and declarations to, upon, for, under and subject to which the same premises would have stood limited and settled under and by virtue of this my will, if the person who shall so succeed to the said title or dignity were dead without issue." The will also contained a gift to the trustees of certain jewels, fixtures, and other articles, in trust that they should go along with the said dwelling-house and be used and enjoyed therewith so long as the rules of law and equity would premit by the person or persons entitled at law or in equity to the possession or the receipt of the rents and profits thereof. The testatrix bequeathed the residue of her personal estate to trustees upon trust to convert the same into money and, subject to certain trusts, to invest the ultimate residue in real estate with the consent of the person for the time being entitled to the possession or the receipt of the rents and profits of the hereditaments thereinbefore devised, if such person should have attained the age of twenty-one years, and otherwise at the discretion of the trustees, to be settled upon the same trusts as thereinbefore declared concerning the said devised hereditaments.

The testatrix died on the 19th of June, 1861. *Martin Leslie Haworth* entered into possession of the devised hereditaments, and obtained a Royal Licence to take and use the name and arms of *Leslie*. During his life the devised hereditaments were sold under the provisions of the *Settled Estates Act*, and the proceeds invested in Consols in the names of the trustees. He died on the 15th of July, 1882, leaving an only son, the Defendant *Norman Evelyn Leslie Leslie*, who was born in July, 1877. On the death of *Martin Leslie Haworth*, the trustees of the will paid the dividends of the trust fund, representing the devised hereditaments, to the guardians of the Defendant *Norman E. Leslie Leslie* for his maintenance and education.

On the 19th of September, 1893, the Defendant *Norman E. Leslie Leslie*, being still an infant, succeeded to the title and dignity of the Earldom of *Rothes*, on the decease of his paternal grandmother, the Countess of *Rothes*. The third and fourth sons of *Mary Elizabeth Haworth*, mentioned in the said will, died

without issue. The Plaintiff *Raymond Evelyn Leslie* was the fifth son, and would be entitled to an estate for life in the said devised hereditaments if the Defendant *Norman E. Leslie Leslie*, Earl of *Rothes*, were dead without issue. He claimed to have become entitled for life, under the provisions of the will, to the income of the trust fund representing the devised hereditaments on the succession of the Defendant *Norman E. Leslie Leslie* to the Earldom of *Rothes*.

A special case was settled under Order XXXIV., in which the above facts were stated, and the opinion of the Court was asked as to the rights of the parties to the trust fund.

The special case was heard before Mr. Justice *Kekewich* on the 13th of March, 1894.

Crackanthorpe, Q.C., and *B. B. Rogers*, for the Plaintiff:—

Upon the succession of the infant Defendant to the Earldom of *Rothes* the shifting clause took effect, and the Plaintiff became entitled as tenant for life. Upon the language of the shifting clause taken alone there could be no shadow of question; the only doubt arises by reason of the ambiguous use of the word "possession" in other parts of the will. That word, as was intimated by Lord Justice *Fry* in *Lyell* v. *Kennedy* (1), is most equivocal. It is sometimes used as referring to possession *de facto*, *i.e.*, the actual and physical possession, or the actual physical receipt of the rents; at other times it is used of the possession *de jure*, *i.e.*, the possession of the person who, having an estate *in presenti*, and not in reversion or expectancy, is entitled to the receipt of the rents. In this will the word is used in both of these senses. It is clear that an infant is treated as a person in possession. In addition to the clauses set out in the special case, it is right to refer to the trust to preserve contingent remainders, and the gift of the jewels and chattels as heirlooms upon trusts corresponding with the limitations of the dwelling-house. In each of these clauses the possession referred to is a possession in title. The name and arms clause expressly recognises the fact that an infant may be a person "beneficially entitled to the possession or to the receipt of the rents and

(1) 18 Q. B. D. 796, 813.

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profits." And again, in the gift of the chattels an infant is treated as a person who is to enjoy the jewels and heirlooms as being entitled in possession. This use of the expression "entitled in possession" is recognised and adopted in the *Settled Land Act*, 1882, ss. 2, 58, where title in possession is contrasted with title in reversion or expectancy: see *In re Atkinson* (1). In the management clause, which has a special purport, the language and context are different, and the word "possession" must have a different meaning. The object of that clause is that if the property is in lease, and the infant cannot give a discharge, a receipt may be given by the three trustees, and that if the property is not in lease, the three trustees may enter into actual physical possession of the property, manage it, superintend it, and maintain the infant. As to this meaning of the word "possession," see *Stroud's* Judicial Dictionary (2); *Jacob's* Law Dictionary; *Pollock* and *Wright* on Possession (3). In the shifting clause, on which the question turns, the word "possession" is used in connection with the word "entitled," and refers to the legal title to possession. No entry by the trustees under the management clause could affect the title of the infant to possession. The physical and actual possession might be in the trustees; but the infant would still remain entitled in possession under the will. The intention of the testatrix was that the earldom and the estate should not be united in one person. It may be mentioned that the whole of the income is now being received by the infant, so that he is practically in the same position as if he were of full age, and has the possession *de facto* as well as *de jure*.

Cozens-Hardy, Q.C., *Renshaw*, Q.C., and *Vernon R. Smith*, for the infant Defendant:—

The infant, when he succeeded to the earldom, was not a person "for the time being entitled to the possession, or to the receipt of the rents and profits," within the meaning of the shifting clause, and therefore the gift over has not taken effect, and there has been no displacement of his title as tenant in tail. A

(1) 31 Ch. D. 577. (2) Pages 601–603.
(3) Page 18, *et passim*.

shifting clause must be construed strictly: see *Meyrick* v. *Laws* (1); *Partridge* v. *Partridge* (2); and the Plaintiff, seeking to bring himself within the clause, must shew the affirmative proposition that the infant was, in September, 1893, entitled to the possession. This shifting clause cannot be read alone, detached from the rest of the will; and when the management clause is referred to, it is manifest that the infant was not entitled either to the possession or to the receipt of the rents and profits. No doubt he would have been so but for that clause; but by it both the possession and the receipt were taken from him. It is said that the language of the shifting and management clauses ought to be differently construed; but there is no necessity for so doing. The expression "possession" refers to property in hand, and "receipt of rents and profits" to property which is not in hand. The trustees are to have the possession in one case, and the receipt in the other, and what they are to have the infant is not to have.

There is no authority precisely in point; but the nearest case is *Fazakerly* v. *Ford* (3). That case is cited in the text-books as the decision of the Vice-Chancellor *Shadwell* only; but it appears from 1 *Adolphus* and *Ellis* (4) that the case was sent by the Lord Chancellor to the King's Bench for the opinion of the Judges. In that case there was a shifting clause in case a tenant in tail should be "actually in the possession or receipt of the rents and profits," and, the estates having devolved on a tenant in tail incumbered with a term, it was held that they did not go over.

This case is far stronger than that, for here, so far from its being said that the infant is entitled, it is said that he is not—*i.e.*, that he would have been entitled but for the management clause. *Fazakerly* v. *Ford* has been approved by Lord *St. Leonards*: see *Harrison* v. *Round* (5).

Here neither in form nor in substance is the infant entitled; what he receives is simply an allowance, and therefore the event contemplated by the shifting clause has not happened.

(1) Law Rep. 9 Ch. 237.
(2) [1894] 1 Ch. 351.
(3) 4 Sim. 390.
(4) Page 897.
(5) 2 D. M. & G. 190.

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Warmington, Q.C., and *E. Knowles Corrie*, for the trustees.

Crackanthorpe, in reply:—

Fazakerly v. *Ford* (1) is not in point. The whole argument there turned on actual possession—*i.e.*, possession *de facto*—and no word was said about possessory title. The other authorities referred to are still further afield.

KEKEWICH, J.:—

The ambiguous character of the term "possession" is well known, and has been recognised by high authority. It has several meanings, and it may well have several different meanings in the same instrument, some of them overlapping one another, and some being combinations of more than one. But in an instrument dealing with real estate "possession" means broadly one of two things. It may mean what has been styled during the argument "physical possession," as when a tenant in fee occupies and farms his own land, or if not farming his own land, still occupies in the sense of receiving his rents from his tenants. In that connection, the alternative to "possession," natural, proper, technical, strictly legal, is receipt of the rents and profits. Again, "possession" in a legal instrument is frequently used with reference to the title, and to designate that title which is enjoyed *in presenti* as distinguished from that which is to be enjoyed *in futuro*—the distinction being between an estate in possession and an estate in remainder, reversion, or expectancy. In most legal instruments, and among others in this will, I think it is generally possible to give to the word "possession" either one or the other of these two meanings, although, no doubt, they occasionally overlap one another.

I have to consider the meaning of the word "possession," combined with receipt of rents and profits in this particular shifting clause, which, according to all the rules applicable to such clauses, must be construed strictly.

Of course, I ought to look at the whole will, and I have looked attentively at every clause to which counsel have called attention, knowing that between them they would not have

(1) 4 Sim. 390.

omitted to call attention to any that had the slightest bearing on the one under consideration; but I can only look to the rest of the will in order to see whether I there find an interpretation clause, or, as it is sometimes called, a "dictionary." If I could find that the testatrix had said, in effect (for of course she has not in words), "When I use the word 'possession' I mean so and so"—that is, I mean "either a title in possession, or physical possession," then, of course, I should have nothing to do but to read her interpretation into this particular shifting clause, and to construe it accordingly. But I fail to find any such dictionary.

I turn first to the two clauses which are not in the special case, and which I take leave to say have been omitted with perfect propriety; but still, as they have been referred to in argument, I think it right to mention them.

The first is a remainder in the nature of a limitation to trustees to preserve contingent remainders. It seems that *Mary Elizabeth Haworth* had five sons living. There are successive limitations to them (passing over the second son) for their respective lives, with remainders to their respective sons successively in tail; and then there are similar limitations in favour of her sixth and every other son. Of course, the remainders following those limitations, and several of the others consequent thereon, were remainders which required, according to the then law, an estate of freehold to support them. The testatrix, therefore, being well advised, limits an estate to trustees to support those contingent remainders, and it is a mere formal estate for that purpose not intended to confer—at least, not having for its end and object to confer—any enjoyment on anybody, and so the trustees are to hold the estate only during the remainder of the life of preceding tenant for life upon trust "to permit the rents, issues, and profits of the said hereditaments to be received and taken from time to time by the person who, if the said *Mary Elizabeth Haworth* were dead, would for the time being be entitled to the possession or receipt of the same rents, issues, and profits under the limitations hereinafter contained." It was not the object of the draughtsman nor of the testatrix there to define who was in possession or receipt of rents and profits; in fact, the draughtsman might have been led into

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considerable trouble if he had endeavoured to define it. All he desired to say was: These trustees whose estate is limited to support the contingent remainders hold the rents and profits for the time being for him, whoever he be, who is entitled thereto under the limitations hereinafter contained, and he does that by the convenient form of description I am reading—"person entitled to the possession or receipt of the same rents, issues, and profits." To use that clause as an interpretation of the shifting clause, which is for a different purpose, seems to me to be using the language of one part of the will to construe another part to which it is not apposite. The same remark applies to the gift of jewels. The object there is entirely of a different character. The testatrix desires to give to trustees, and to settle so far as she can, certain jewels, trinkets, pictures, and so forth; and so, in a common form, she directs the trustees to hold those articles so that they may "go along with my said dwelling-house and be used and enjoyed therewith as long as the rules of law and equity will permit, by the person or persons for the time being entitled at law or in equity to the possession or the receipt of the rents and profits thereof." There may be some question what that means; but that question has no reference at all to the shifting clause. The draughtsman has not in his mind the shifting of the estates. All he cares for is, that these personal chattels shall, as far as possible, by a short form, be attached to the real estate, and, having done that, he confines his attention to the limitations of the real estate, considering, no doubt, that the chattels will pass in due course by force of the general words which he has inserted. I put this aside.

Then there is another provision which is set out in the special case, and which precedes the shifting clause in question, being itself a shifting clause, and deserves closer attention because it is more *in pari materiâ*. There, as has been pointed out by Mr. *Crackanthorpe*, we have the introduction of the words, "beneficially entitled to the possession or to the receipt of the rents and profits," shewing that the testatrix had in her mind those who actually enjoyed the estate, and not those who took it as trustees.

No doubt, there we have a general clause in which possession

is referred to in general terms and without any limitation such as is attempted to be imposed (successfully or not, I will presently say) on the meaning of the words of the other shifting clause. But we also find this—that the testatrix has expressly provided there for minority, and she has laid down rules as regards time which can be worked out with regard to minority and full age, so that the clause really construes itself without reference to any other. It must also be borne in mind that this clause which I am now considering precedes the clause (to which I will presently turn) which provides for management during minority, so that down to this time the testatrix has taken it for granted that all those who are in enjoyment will, subject to the provisions which she has made here, be of full age. She then apparently, according to the form (which is a common one), recollects the possibility of that clause not applying immediately, or applying harshly by reason of minority, and so she introduces a provision to prevent that result. The fact of her having made that special provision for minority there is hardly a reason to my mind for saying that minority was not in contemplation in the other shifting clause. The two clauses are very differently framed, and I think it would be pushing too far the rule that words must be treated as used in the same sense in different parts of the will, where they are dealing with the same subject-matter, to say that that clause governs the other.

But, then, between that clause and the other shifting clause, on which the main question turns, comes the management clause, which strikes me as of the greatest importance. The testatrix, again using a form which, unless my memory is in fault, is a very common one, speaks not of the person who is "entitled to the possession or receipt of the same rents, issues, and profits," but of the person who, but for this proviso, would be entitled. "I am now," says the testatrix in effect, "going to deal with the minority of a person who, under the limitations of this will, and if this proviso were not inserted, would be in possession or receipt or enjoyment of the rents, issues, and profits. During that time the trustees shall enter into the possession or receipt of the rents, issues, and profits"—the very same phrase. They are to be the occupiers if the farm is in hand. They are to receive the rents

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if the farm is let to a tenant, and during the minority. So that she not only provides for the contingency of an infant becoming entitled, but says that the infant shall not be entitled, and that somebody else shall be. During that time the trustees are to apply such part of the income as they think fit for the infant's maintenance. He can take it as maintenance. Whether with the sanction of the Court or without it, it matters not. He does not take it as rents and profits.

The next clause, a subsidiary one, was passed over, I think, by both sides in argument; but it is worthy of passing notice. It is a proviso attached to the management clause, and really part of it, and it says that it shall be lawful for *Martin Leslie Haworth* "during his life, after he shall have attained the age of twenty-five years, and for any person for the time being beneficially entitled as tenant for life to the rents and profits of the said hereditaments and premises hereby devised, being of the age of twenty-one years, and for the said trustees or trustee at their or his discretion during such time as the said *Martin Leslie Haworth* shall be under the age of twenty-five years, and during the minority of any person who if of full age would be entitled at law or in equity to the possession or to the receipt of the rents and profits of the said hereditaments and premises," to make appointments by way of demise as therein mentioned. The testatrix does not there speak of the minors as being entitled, because they are not; they could not be according to the proviso in the previous clause; but, using the same language as in the previous clause, she speaks of the persons who are under age as being persons who would be entitled if of full age. Immediately after that comes the shifting clause now in question; and it struck me from the first that it would be an extremely strong thing to say, that whereas in two clauses of great importance—clauses which confer vast powers on trustees during minority, and expressly contemplate that minority—the testatrix has made express provision for the management of the property during the minority of an infant tenant for life or tenant in tail, and has excluded that person from the "possession or the receipt of the rents and profits," yet in the very next following clause in which the same words are used the person who has thus been excluded is

nevertheless to be regarded as a person entitled to the possession or to the receipt of the rents and profits. It may be so; but it is a jump in construction which one hesitates to take. But there seems to be no reason why one should take that jump. The testatrix says: "I hereby declare that if any person for the time being entitled to the possession or to the receipt of the rents and profits of the said hereditaments and premises herein devised shall succeed to the title or dignity of Earl or Countess of *Rothes* . . ." Who has succeeded? An infant—an infant tenant in tail. Is the infant tenant in tail entitled to possession, or to the receipt of the rents and profits? If so, how? Possibly by the limitations in the will. But, then, the limitations in the will are superseded by the proviso that this infant tenant in tail shall not be entitled—that is to say, he is treated as a person who would be entitled but for the proviso, but who is not entitled because the trustees are.

It seems to me that the very words fit in exactly to the preceding clause; that the preceding clause fits in exactly here, and that there is nothing in the rest of the will to oblige me to say, contrary to the grammatical construction of this clause, and of those with which it is connected, that "possession" here means possession in title, or that this clause means that the property is to go over if any person who happens to be the Earl or Countess of *Rothes* shall be also the person who has an estate for life or in tail in possession under this will—that is to say, as distinguished from reversion.

I think I am bound to construe it the other way, with the result that the shifting clause has not operated, and the Earl of *Rothes* remains, notwithstanding the succession to the title, tenant in tail, in possession, doubtless, as distinguished from remainder, but not in possession, as in the sense of enjoyment, but merely receiving maintenance, by virtue of the clause of management, from the trustees who are in possession or in receipt of the rents and profits.

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From this judgment the Plaintiff appealed. The appeal was heard on the 8th of May, 1894.

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Crackanthorpe, Q.C., and *B. B. Rogers*, for the Appellant, argued, as in the Court below, that the words "possession or receipt of the rents and profits" referred to the title having vested in possession, and applied to an infant as well as an adult, and that the estate had therefore gone over on the Defendant succeeding to the earldom. They relied on the use of the words in other parts of the will and cited *Fazakerly* v. *Ford* (1).

Cozens-Hardy, Q.C., and *Vernon R. Smith*, for the Defendant, contended that the words in a shifting clause must be construed strictly, and that the words in question referred to the actual possession or receipt of the rents by the person on whom the estate devolved, which in the case of an infant was taken from him by the will and vested in the trustees. They referred to *Lady Langdale* v. *Briggs* (2).

[They were stopped by the Court.]

E. Knowles Corrie, for the trustees.

Crackanthorpe, in reply.

LINDLEY, L.J.:—

I do not pretend to have mastered this will, because there is a good deal in it which I do not understand; but I think I can see my way through it sufficiently to dispose of this appeal. It is the will of a lady who devised her property in the events which have happened to the present Earl of *Rothes*, who is tenant in tail in possession with remainder to the Plaintiff. The question is whether under this will the estate which is vested in the Earl of *Rothes* subject to the divesting clause, which I will read presently, is to vest in the next tenant in tail. That is the short point.

In order to answer that question, we must look through the will and see if we can what this lady was aiming at, and get at her intention through the language she has used. Having devised the estate in the way I have mentioned, there is a name and arms clause which runs thus:—[His Lordship read the clause stated above, and continued:—] On that clause, the

(1) 4 Sim. 380. (2) 8 D. M. & G. 391.

observation which has been made is right, namely, that it shews that there may be a person under age who may become beneficially entitled to possession or to the receipt of the rents and profits of the hereditaments. With respect to the word "peer," when you bear in mind that if he shall become a peer he is to take the surname of *Leslie*, and the arms of *Leslie* quartered with it, and when you bear in mind that *Leslie* was the family name of *Rothes*, I doubt whether the word "peer" there refers to the earldom of *Rothes*. It does not seem to me adapted to that particular case. I think you must construe the word "peer" as meaning something besides or excluding the Earl of *Rothes*.

Now I pass on from the name and arms clause and come to the management clause during the minorities of the tenants for life and tenants in tail by purchase. [His Lordship read the clause, and proceeded:—] Now, what does that clause mean? First, what are the trustees to do? They are to enter into possession or receipt of rents, issues, and profits of the said hereditaments. What does that mean? It means that they are to take possession of such hereditaments as are not let, and are to receive the rents and profits of such hereditaments as are let. They are to hold and continue in such possession subject to the trusts of keeping up the property and the maintenance of it. They are not to stand possessed of the surplus in trust for the owner of the property, but they are to capitalize it; it is to go into the residue and be capitalized, and then it is to be invested in the purchase of land; but the person entitled to the property is not to be the sole *cestui que trust*. That is the important point. Now I ask myself this question: Whilst these trustees are in possession or receipt of the rents, issues, and profits of this property, can any one else be in possession and receipt of the rents, issues, and profits of the same property? It is very difficult to see that they can. Then there is a leasing clause, in which the same expression is used; and then we come to the shifting clause, and it is on the meaning of this shifting clause that the whole of this case turns. [His Lordship read the clause as set forth above, and proceeded:—]

Now we have to apply that to the facts. What does the expression "any person for the time being entitled to the possession

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or to the receipt of the rents and profits" mean? Mr. *Rogers* asks us to read it in this way, "And I declare that if any person for the time being entitled to the property." That is not what the testatrix says, and I do not think that is what she means. If she meant that, she would not have employed the longer expression, "If any person entitled to possession or the receipt of the rents and profits." Then it is suggested that it means entitled in possession, as distinguished from being entitled in reversion. But there, again, the expression is not any person entitled in possession, but entitled to the possession or to the receipt of the rents and profits. No doubt in the present case the Earl of *Rothes* is in one sense the tenant in tail in possession as contrasted with remainder or reversion. But that does not answer this language. He is not in possession and receipt of the rents and profits. The trustees are in possession and receipt of rents. Nor is he entitled to the possession or the receipt of the rents and profits. In other words, the event on which this property is given over has not happened as I construe this clause. I do not profess, as I said before, to have mastered this will. I do not quite see what the lady was aiming at. She certainly was not, to my mind, trying to keep this property away in all cases in which it might devolve upon or come to the Earl of *Rothes*. She seems to have been trying to discriminate in some way, and there I fail to catch the intention. All I can say is that, construing this will as best I can, the event in the shifting clause has not happened.

The appeal, therefore, will be dismissed.

LOPES, L.J.:—

I am of the same opinion. The present Earl is seventeen years of age—an infant, and tenant in tail by purchase, and in those circumstances we are asked to construe this shifting clause. I must confess, equally with Lord Justice *Lindley*, I am unable to see what the object of this shifting clause is. I am unable to see precisely what the testatrix had in view; but I look at the clause, and I endeavour to construe it as best I can, having regard to the language used in it, and also to the other expressions in the will and the surrounding circumstances. The first

question is, what is the meaning of "entitled to the possession or to the receipt of the rents and profits of the said hereditaments and premises"? It was contended by Mr. *Crackanthorpe* that possession is used in opposition to reversion. I cannot think that that is the correct view. In my opinion, the words "the possession or the receipt of rents and profits," as used here, are quite clear. Possession, in my judgment, refers to a property which is not let—probably to the mansion-house—but, at all events, to any property that is not let; and receipt of rents and profits refers to property that is let. I give the ordinary meaning to those words. Now, a case has been cited to us—a very valuable one—as to the proper mode of construing a shifting clause like this. I refer to *Lady Langdale* v. *Briggs* (1), and there is a short passage in the judgment of Lord Justice *Turner* which I will read: "The authorities, I think, warrant us in saying that these shifting clauses, if not to be construed strictly, are, at all events, not to receive such a construction as shall carry them beyond the purpose for which they were designed. The intention of the testator, to be ascertained from the language which he has used, and from the surrounding circumstances, so far as those circumstances can be regarded in proof of the intention, must govern the construction of shifting clauses as well as of other clauses of wills, but regard is also to be had to the rule that an estate, well created, is not to be taken away by doubtful or equivocal expressions." Now, looking at other passages in the will, it appears to me that the testatrix has herself put an interpretation on the words "possession or receipt of the rents and profits," and I refer particularly to the management clause, because there we find a provision that the trustees "do and shall enter into the possession or receipt of the rents, issues, and profits of the same hereditaments and premises, and do and shall during such time and minority hold and continue such possession or receipt of rents, issues, and profits, and manage or superintend the management of the same hereditaments." Then there is a provision with regard to the maintenance and education of the infant, and a provision that the income is to be capitalized. Now, it seems to me very difficult to say that the language used in the shifting

(1) 8 D. M. & G. 391, 429.

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clause can have any reference to the possession of the infant Earl, and in point of fact, according to this management clause, the possession and receipt of the rents and profits is not in him, but in the trustees. I cannot myself see how the possession or receipt of the rents and profits can be in two people at the same time. I say that as shewing what is meant by "possession or receipt of the rents and profits" in the shifting clause. But, then, when we come to look at the clause which immediately precedes, there are expressions which to my mind are more cogent still. It is a clause making provision for granting leases during minorities, and there these words occur: "And during the minority of any person who if of full age would be entitled at law or in equity to the possession of them, or to the receipt of the rents and profits of the said hereditaments and premises," thereby contemplating, as I read the words, that there might or would be an infant who, being a minor, would not be entitled in law or equity to the possession of the property or the receipt of the rents and profits. Both those clauses seem to me strongly to shew that the meaning of the words "possession or receipt of the rents and profits" in the shifting clause is such as I have stated. According to my view, therefore, the Earl was not in possession or in receipt of the rents and profits within the meaning of that shifting clause; but even if I am not correct in that meaning, and have formed too strong an opinion upon it, I am clear that the expressions used are so equivocal as to bring the case within the authority where it is established that the words which destroy or shift a gift must be as clear as those which create it. In this will the words, to say the least of them, are most ambiguous. I therefore think the decision of the learned Judge in the Court below was right.

KAY, L.J.:—

I also think that the only safe mode of dealing with a shifting clause like this is to say that anybody claiming the estate as having gone over must shew very clearly that he comes within the words of the clause. It is a prominent canon of construction that words which divest a gift clearly given should be as clear as the words which confer it. That was established in the case of *Doe*

v. *Hicks* (1), and it was referred to and acted on in the case of *Lady Langdale* v. *Briggs* (2), in the words which have been read by Lord Justice *Lopes*.

Now, beginning with this shifting clause, it most clearly does not divest the estate of any person who becomes the Earl of *Rothes*, unless that person is for the time being entitled to the possession or the receipt of the rents and profits of the hereditaments devised by the will. I read the words "possession or the receipt of rents and profits" thus. Some part of the estate, the dwelling-house for instance, may be in hand—not let, and not producing rents and profits. Possession as contrasted with receipt of rents and profits means possession of such parts of the estate as do not yield rents and profits, and entitled to the receipt of the rents and profits refers to such parts of the estate as produce rents and profits. The Earl of *Rothes*, if he became Earl while he was an infant under these limitations, was tenant in tail in possession as contrasted with being entitled in reversion. The estate was not in reversion, but it was an estate in possession, and it is to be observed that it was a legal estate, and the limitation was a legal limitation. But does this clause mean entitled in possession as contrasted with entitled in reversion? It does not say so. Those are not the words. It is not "entitled in possession," which is the ordinary phrase used when we contrast title in possession with title in reversion, but it is "entitled to the possession or to the receipt of the rents and profits of the said hereditaments and premises." Then by the management clause, which shortly precedes this, it is provided that during the minority of "any person who under or by virtue of this my will would, if this present provision had not been inserted, for the time being be entitled to the possession, receipt or enjoyment of the rents, issues, and profits as tenant for life, or tenant in tail by purchase," the trustees are to enter into possession or receipt of the rents, issues, and profits, and during such minority they are to hold and continue in such possession and receipt, and they are to maintain the estate out of any moneys coming to their hands, they are to pay the expenses of such management, they are to maintain the infant, and they are to capitalize the residue of the rents. So that during his minority he is not

(1) 8 Bing. 475. (2) 8 D. M. & G. 391.

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entitled to receive one farthing of the rents—he is not entitled to possession of any of the property which does not produce rent, but the trustees who are in possession are entitled to that possession and receipt of rents, and he is not even beneficially entitled, for the rents which they are entitled to receive are not to be handed over to the infant, but to the trustees. He is only entitled to receive out of them such moneys as the trustees shall think fit to allow for his maintenance; therefore he cannot during his minority be entitled to the possession of any land, nor can he during his minority be entitled to the rents and profits of any land. Consequently, if the earldom devolves upon him, he can say, as he says here, "I am not in possession; therefore this shifting clause does not apply to me." But it is answered that in various other parts of the will the words "entitled to possession or receipt of the rents" are used in such a sense as to shew that in the opinion of the testatrix for some purposes an infant might be entitled. I agree there are such phrases in the will; but we have to deal with this particular clause. I agree it is extremely difficult to see any intelligible reason why the testatrix should provide that if the earldom descends to an adult who is entitled in possession the estate shall shift, but if it devolves upon an infant the estate in possession, as contrasted with the estate in reversion, shall not shift. I cannot see any reason for it; but because I cannot see any reason for it, am I to depart from the rule which has been laid down and acted upon? I have asked the learned counsel to tell me what their notion of the scheme of the will is. The only answer they can give is that the shifting was to take effect in all cases where the estate was not in reversion. All I can say is that there are not words which bear out that contention. I agree most entirely in the canon of construction which has been referred to. It seems to me that during the minority of this infant the possession and receipt of the rents and profits is taken from him and vested in trustees, and therefore the event that the shifting clause contemplated has not happened.

I think the learned Judge in the Court below was right, and that this appeal should be dismissed.

Solicitors: *Tathams & Pym; Russell Cooke & Co.*

M. W.

In re WINKLE.

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May 7.

Lunatic—Judgment Creditor—Execution—Receiver—Maintenance of Lunatic—Maintenance of Wife—Priorities—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *ss.* 116, 117—*Form of Order.*

Where the property of a lunatic has become subject to the control of the Court in Lunacy by the appointment of a receiver, it cannot be seized under a writ of *fi. fa.* by an execution creditor of the lunatic; and the Court will make an order for bringing the lunatic's property into Court, and for payment thereout of costs and of an allowance for the maintenance of the lunatic—though not of his wife also—in priority to any claim of the execution creditor; but, subject to such allowance and to the costs incurred in relation to the lunatic's property, the order will be made without prejudice to any charge or priority which the creditor may have acquired by lodging his writ of *fi. fa.* with the sheriff.

Form of order for maintenance of a lunatic where a judgment creditor has obtained execution.

EDWARD WINKLE, Junr., a music-seller at *Great Malvern*, having become of unsound mind, though not so found, was, on the 12th of January, 1894, removed from his residence to the *Worcester County and City Lunatic Asylum* as a private patient. He was a married man, thirty-six years of age, but had no children. His estate was insolvent, his debts amounting to about £900, and his property—which consisted of the leasehold house in which he had resided and carried on his business, and the goodwill and stock-in-trade—being worth about £350. On the 9th of February, 1894, his bankers commenced an action against him in the Queen's Bench Division to recover £315, the amount of his overdraft, and costs. On the 12th of March his wife took out a summons in Lunacy under sect. 116, sub-sects. 1 and 2, of the *Lunacy Act*, 1890, returnable on the 21st of March, for leave to sell his property, and retain out of the proceeds the sum of £2 weekly for the maintenance of herself and her husband until further order: also to pay, out of the proceeds of sale, the costs incurred in the Queen's Bench action.

On the 16th of March, before that summons had been heard, the Plaintiffs in the action obtained judgment under Order XIV. for the full amount of their claim. On Saturday, the 17th, the

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Plaintiffs lodged a writ of *fi. fa.* with the sheriff, who, on the morning of Monday, the 19th, took possession of the lunatic's leasehold house and stock-in-trade, and levied execution. In the afternoon of the same day, the wife applied *ex parte* to Lord Justice *Davey*, sitting in Lunacy, for and obtained an order appointing her interim receiver, with power to take immediate possession, until the summons had been disposed of by the Master in Lunacy. As the sheriff refused to withdraw, an order was obtained on the 21st of March, 1894, from Mr. Justice *Grantham* ordering a stay of proceedings in the action and directing the sheriff to withdraw, which he did, and Mrs. *Winkle* thereupon took possession as receiver. The Plaintiffs then appealed to the Divisional Court, who discharged that order, without costs, and directed that the Plaintiffs should take no fresh proceedings to enforce the judgment by writ of *fi. fa.* until the matter had been brought before the Judge or Master in Lunacy.

On the 3rd of April the summons came before the Master in Lunacy, who directed Mrs. *Winkle* to sell all the assets of the lunatic, pay the proceeds into Court for investment in Consols, and out of the dividends and (by the periodical sale of Consols) out of *corpus* to raise £1 per week for the maintenance of the lunatic and a further £1 per week for the maintenance of herself, and that the costs of the summons and of defending the Queen's Bench action should be paid out of the estate.

Thereupon, a scheme to carry out these directions was prepared for the sanction of the Lords Justices, one of its proposals being that Mrs. *Winkle* should "be authorized to apply a sum not exceeding £52 a year in the maintenance of" her husband; and further, that, "subject to such allowance, she should be authorized to apply, in her own maintenance, a sum not exceeding £52 a year." Mrs. *Winkle* now applied to the Lords Justices to sanction the scheme.

E. S. Ford, for the Applicant:—

The principal question is whether the lunatic and his wife are entitled to maintenance out of the lunatic's property in priority to his creditors. I submit that, where the lunatic's property is subject to the jurisdiction of the Court in Lunacy, both he and

his wife are entitled to be maintained out of it in priority to the creditors: *In re Pink* (1).

[LINDLEY, L.J.:—Sect. 117 of the *Lunacy Act*, 1890, shews how we can apply the lunatic's property. It says we may order it to be applied in "payment of or provision for the expenses of his future maintenance," but it says nothing about the wife.]

It is stated in *In re Pink* (2) that the maintenance of the lunatic's wife and children are also to be considered before the creditors.

[LOPES, L.J.:—I see that sub-sect. 4 of sect. 116 says that provision may be made "for the maintenance or benefit of the lunatic, or of him and his family." The question is whether that can be done as against creditors. It is a strong thing to prefer the lunatic to his creditors; but to prefer his family to his creditors is stronger still. Sect. 117 is against you.]

At all events, the lunatic himself is entitled to maintenance in priority to the creditors: *In re Plenderleith* (3).

Ernest Pollock, for the judgment creditors:—

[LINDLEY, L.J.:—What do you say as to an allowance for the maintenance of the lunatic himself in priority to your claim?]

I am in this strong position, that I have a prior charge by virtue of the writ of *fi. fa.*, and I must be treated as still in possession.

[LINDLEY, L.J.:—The property of this lunatic is in the hands of a receiver. I do not think you will persuade us to let that property go. We must leave you to such advantage as you have under your judgment, consistently with a proper allowance being made for the maintenance of the lunatic.]

I do not ask the Court to reduce the lunatic to the condition of a pauper, but I ask for the payment of a sum to me on account of my judgment debt and interest. I submit that I am entitled to have my priority declared, and to be included in the scheme accordingly.

(1) 23 Ch. D. 577. (2) 23 Ch. D. 581.
(3) [1893] 3 Ch. 332.

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[KAY, L.J.:—We can make the order without prejudice to any charge you have obtained by putting the writ into the hands of the sheriff. You may or may not have a charge: that is not the question now before us.]

I submit that the sheriff can hold the property as against the receiver.

LINDLEY, L.J.:—

The position of affairs is that the property of this lunatic is subject to the control of the Court by the appointment of a receiver. It is the old story: a judgment creditor of the lunatic has obtained execution; but the execution creditor is not entitled, as the law stands, to take the property of the lunatic away from the jurisdiction of the Court, with the possible result of sending him to a pauper lunatic asylum. Subject, however, to the lunatic being properly maintained, the creditor is entitled to the property. That has been the settled law as long as the Court of Chancery has existed, and we are not going to alter it.

The proper order, therefore, will be to confirm the scheme authorized by the Master, striking out the allowance of £1 a week to the lunatic's wife; the costs of the Applicant to come out of the lunatic's estate, and the judgment creditor to add his costs to his judgment. The order will also provide that no variation be made in the scheme now confirmed without notice to the execution creditors, and will be without prejudice to any charge or priority they may have acquired by lodging the writ of *fi. fa.* with the sheriff. It is quite possible the lunatic may be taken into the care of his wife, and that the maintenance may then be increased; but that cannot be done without notice to the execution creditors.

LOPES and KAY, L.JJ., concurred.

By the scheme or order as finally drawn up, after reciting the various proceedings and an undertaking by Mrs. *Winkle* to apply all moneys she might receive belonging to her husband or his estate in such manner as the Masters in Lunacy should direct, and to account and give security, to send periodical

reports to the Masters of her husband's condition, and to allow him to be visited by the usual officers; and that it had been established to the satisfaction of the Lords Justices that the husband was of unsound mind and incapable of managing his affairs, and that his property did not exceed £2000 in value; it was ordered that Mrs. *Winkle*, on completing her security, should be at liberty to sell the stock-in-trade and goodwill of her husband's business of a music-seller, together with the lease of the house; that she should lodge the proceeds in Court, to be dealt with as directed by the schedule to the order; that she should apply the half-yearly allowances to be paid to her as provided in the schedule, as to £26, in the maintenance of the husband, and as to £1 10*s*., in paying for the costs of obtaining each of such half-yearly payments: "5. That, subject to the last-mentioned allowance, and to payment of the costs hereinafter directed to be taxed and paid, this order be without prejudice to any charge or priority which the said" creditors "may have acquired by lodging their writ of *fi. fa.* with the sheriff on the 17th of March, 1894. 6. That no variation of this order increasing the payments hereby directed to be made out of the estate of the said *Edward Winkle* be made without notice to the said" creditors. "7. That the said" creditors "be at liberty to add their costs to their said judgment debt, and to apply to the Masters in Lunacy for payment of what is due to them for principal or interest consistently with this order"; that Mrs. *Winkle's* costs of the present application and of obtaining the order appointing her receiver, and in relation to the Queen's Bench action, should be taxed.

The payment-schedule to the order directed the investment in New Consols of the cash when lodged, the raising and payment of the taxed costs, and the raising and payment of £27 10*s*. half-yearly to Mrs. *Winkle*.

Solicitors: *Street, Poynder, & Whatley*, agents for *H. L. Whatley, Great Malvern; Black & Moss*, agents for *E. Nevinson, Great Malvern*.

G. I. F. C.

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CHITTY, J.
Feb. 8, 10, 13.
C. A.
April 28, 30; *May* 10.

In re MAYOR OF LONDON AND TUBBS' CONTRACT.

[1892 L. 1148.]

Vendor and Purchaser—Conditions of Sale—Purchase—Contract—Completion—"Any cause whatever"—"Wilful default" of Vendor—Honest Mistake—Delay—Defective Abstract—Purchaser not having Purchase-money ready—Interest on Purchase-money.

On a sale of real estate by auction one of the conditions, after fixing the 24th of June, 1892, for completion of the purchase, provided that, "if from any cause whatever, other than wilful default on the part of the vendors," the purchase-money should not then be paid, it should bear interest at 5 per cent. Another condition purported to describe the statutory title under which the vendors, who were a corporation and had been in possession for a long period, were selling. Upon subsequent investigation it appeared that, through having omitted to examine their alleged statutory title, the vendors had misdescribed it in the condition, an important part of the property being held under an entirely different statutory title, and eventually the title to the whole was not finally accepted by the purchaser until the 29th of September; but the purchaser did not in fact complete until some months afterwards, having been unable previously to find his purchase-money. He paid interest from the 29th of September until completion, but contended that he was not liable for interest from the 24th of June to the 29th of September, on the ground that the delay in making a good title had arisen from the "wilful default" of the vendors in having omitted to verify their title by proper investigation before making the positive statement in the conditions:—

Held, by the Court of Appeal (*Lindley*, *Lopes*, and *Kay*, L.JJ.), *Kay*, L.J., dissenting, that there had been no "wilful default" on the part of the vendors within the meaning of the condition: but, *held*, by the whole Court, upon the facts, that, even assuming there had been such "wilful default," the non-completion on the 24th of June was really attributable to the purchaser's voluntary delay in making requisitions and examining into the title, and to his inability to find his purchase-money, and that he was therefore liable to interest from that date.

What is "wilful default" discussed.

Chitty, J., affirmed.

ADJOURNED SUMMONS.

At a sale by auction on the 18th of March, 1892, *Henry Thomas Tubbs* entered into an agreement with the Mayor and Commonalty and Citizens of *London* for the purchase, for £98,100, of certain freehold hereditaments, having a considerable frontage to *Farringdon Street*, in the City of *London*, and described as the site

of old *Farringdon Market*, subject to certain printed particulars and conditions of sale, a ground plan of the property being annexed to the particulars. On signing the contract the purchaser paid, according to the conditions, a deposit of £9810.

The conditions of sale fixed the 24th of June, 1892, for the completion of the contract; and the 3rd condition provided that, "if, from any cause whatever, other than wilful default on the part of the vendors," the remainder of the purchase-money should not then be paid, the purchaser should pay interest thereon, at the rate of 5 per cent. per annum, from that day to the day of actual payment thereof.

The 4th condition was as follows:—"The property was purchased and taken by the vendors, the Mayor, &c., of *London*, in or about the year 1824, under the powers of an Act of Parliament, 5 Geo. 4, c. cli., and has for many years past been used or retained for the purposes of *Farringdon Market*, and is now being sold under a statutory power so to do. A copy of the said Act may be seen at the office of the Comptroller of the Chamber of the City of *London* during business hours on the five working days prior to the sale, and the purchaser, whether he shall inspect the same or not, shall have, and shall be deemed to have, purchased with full notice of everything contained in, or to be implied from, the provisions of the said Act. The purchaser shall not require any proof that the property was purchased or taken under the said Act, other than a statutory declaration, to be made, if required, at the expense of the purchaser, by the Comptroller of the Chamber of the City of *London*, that the vendors have been in possession of the property for upwards of thirty years; nor shall the purchaser inquire into or question the title of the vendors to the property, nor require any abstract or evidence of title (other than as aforesaid), nor the production or delivery over of any deeds, nor require any further or other covenant by the vendors than that they have not done any act to incumber the property."

The plan annexed to the particulars had a note on it to the effect that its accuracy was not guaranteed. No time was limited for the delivery of the abstract, or for making requisitions thereon.

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Neither the purchaser nor his solicitors inspected any copy of the Act, 5 Geo. 4, c. cli., prior to the sale, but on the 22nd of March a print of the Act was sent to the purchaser's solicitors, though no copy of the deposited plan, referred to in sect. 2 of the Act, was supplied.

On the 9th of April the purchaser's solicitors delivered to the Comptroller requisitions requiring that a copy of the plan referred to in the Act should be supplied for comparison with the sale plan. To this the Comptroller replied, on the 28th of April, that the purchaser might inspect the plan at the Town Clerk's office.

On the 7th of May the purchaser's solicitors enquired when the plan might be seen, and on the 12th of May they were informed by the Comptroller that it could be seen at any time on giving one day's notice.

Among other requisitions made by the purchaser on the 9th of April was one based on the fact that a portion of the site acquired under the Act of 5 Geo. 4 had formerly been part of a burial ground, and that that portion of the site was not available for building (for which purpose the purchaser had bought the property) unless the human remains were removed, and that a faculty must be obtained for the purpose. This faculty was accordingly obtained on the 23rd of June.

In the meantime, on the 16th of June, the purchaser's solicitors inspected the plan referred to in the Act, when it was for the first time discovered that the sale plan comprised some land which was not delineated on the plan to the Act and had not been acquired by the vendors under the Act of 5 Geo. 4, which fact had been by inadvertence overlooked on the preparation of the conditions of sale. This land was part of that specially referred to in the particulars of sale as forming "an important frontage to *Farringdon Street* on the east." It appeared, on subsequent inquiry, that this portion of the property had been acquired under the *Holborn Valley Improvement Act*, 1864, and that the vendors had not been in possession of it for the thirty years mentioned in the 4th condition.

The vendors, in their replies to the requisitions on this point, admitted that the statement in the 4th condition of sale was inaccurate, and on the 25th of June, the day after that fixed for

completion, they delivered an abstract of title to this portion of the property, and requisitions on this abstract were delivered on the 28th of July. There was some difficulty about producing the title deeds, and the title was not accepted until the 29th of September, when the purchaser's solicitors informed the Comptroller by letter of that date, that, subject to the question of interest, the purchaser was ready to complete. The letter went on to state that the purchaser was prepared to pay interest on the balance of purchase-money, £88,290, as from that date, but disputed his liability to pay any interest up to that date, his contention at the time being that, while the vendors could not withdraw from the sale if he chose to complete, he could not be compelled to complete, and was no longer bound by the conditions of sale or contract, inasmuch as the vendors sold the whole property as passing under a particular title, whereas it turned out that part of the land was acquired from another source; and that the completion of the purchase, so far as he was concerned, was a purely voluntary act. There was no evidence that the vendors or their advisers had, before preparing and publishing the conditions of sale, examined the Act 5 Geo. 4, or the plan therein referred to.

The purchase was completed on the 13th of February, 1893, and the purchaser paid interest on the balance of his purchase-money from the 29th of September, 1892, to the day of completion, the question of his liability to pay interest from the 24th of June to the 29th of September being left open.

The vendors insisted on their right to interest for these three months—some £1155—and now applied by a summons under the *Vendor and Purchaser Act,* 1874, for the determination of this question.

It appeared that the purchaser's original intention was to obtain the balance of his purchase-money by borrowing the amount from third parties, but he had not succeeded in doing so by the 24th of June, 1892, the date fixed for the completion of the purchase; and it was in fact admitted that he had not, at that date, his money actually ready.

The summons came on for hearing before Mr. Justice *Chitty* on the 8th of February, 1894.

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Whitehorne, Q.C., and *A. J. Allen*, for the vendors:—

No wilful default, or intentional omission, can be attributed to the vendors—nothing worse than inadvertence; the delay was occasioned by the title, and not by any wilful default, and under these circumstances interest is payable: *Sherwin* v. *Shakspeare* (1); *De Visme* v. *De Visme* (2). In *Bannerman* v. *Clarke* (3), the vendor died just before completion, and yet the purchaser had to pay interest under a similar clause. The delivery of a defective abstract is not wilful default: *Vickers* v. *Hand* (4); so, too, where delay has been caused by an adverse claim, the purchaser was not exempted from payment of interest: *Williams* v. *Glenton* (5).

In re Young & Harston's Contract (6) is distinguishable, for there the vendor wilfully went abroad just before completion; so, too, is *In re Hetling & Merton's Contract* (7), because the vendors ought to have known, and were taken to have known, that the power of attorney was insufficient, and yet they intentionally fixed so early a date for completion that a fresh power of attorney could not be obtained in time. As a matter of law, we submit that this is not "wilful default" within the meaning of these conditions.

As a matter of fact, the purchaser was not ready to complete on the 24th of June, or even on the 29th of September; he thought the vendors were in a difficulty and could not enforce this contract, so that he need be in no hurry to get his purchase-money ready.

Levett, Q.C., and *Vernon R. Smith*, for the purchaser:—

It was the duty of the vendors to look up the deeds and plan before preparing the conditions, certainly to do so before delivering the abstract; any error or delay arising from such an omission on the part of the vendors is wilful default. Any careful person looking at the plan would have discovered at once that it did not contain the whole of the property; not to

(1) 17 Beav. 267; 5 D. M. & G. 517.
(2) 1 Mac. & G. 336.
(3) 3 Drew. 632.
(4) 26 Beav. 630.
(5) Law Rep. 1 Ch. 200.
(6) 31 Ch. D. 168.
(7) [1893] 3 Ch. 269.

examine the plan was wilful default within the meaning of the condition. Neglect or default may be wilful though it may have been unintentional and have arisen from forgetfulness: *Elliott* v. *Turner* (1); *In re Young & Harston's Contract* (2), and *In re Hetling & Merton's Contract* (3) are in our favour.

The abstract to the land not included in the Act of Geo. 4 was not delivered till the day after the date fixed for completion; and to hold that vendors may do this kind of thing, and yet get interest for delay, would be going further than any of the authorities have yet gone.

Whitehorne, in reply:—

There is no reported case in which a purchaser has been relieved from payment of interest when he had not got his purchase-money ready. The default was not wilful, and the whole of the delay is not attributable to the vendors.

CHITTY, J.:—

To escape from payment of interest under this contract, the purchaser must shew, first, that the vendors were in default in the performance or discharge of some duty imposed upon them under the contract as vendors, and that such default on their part was wilful; and, secondly, that the cause of the contract not being completed by conveyance on the day named, was this wilful default on the part of the vendors. [After reading the conditions of sale and stating the facts as above, and holding that the purchaser was not ready with his purchase-money on the 24th of June or even on the 29th of September, his Lordship continued:—]

Now, this is a short statement of the leading facts of the case, and I have come to the conclusion that the delay in completing the purchase was not attributable to any default on the vendors' part.

If it be necessary after that expression of opinion to deal with the question of "wilful default," in my opinion this is not a case of wilful default within the meaning of the stipulation

(1) 13 Sim. 477. (2) 31 Ch. D. 168.
(3) [1893] 3 Ch. 269.

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in condition 3. The objection, really, when analysed, is an objection to title; and upon a question of that sort, I refer, without repeating them, to the very valuable observations that were made by Lord Justice *Knight Bruce* in *Sherwin* v. *Shakspeare* (1)—observations which are still in point, although that was not a case of a qualified condition in regard to the payment of interest. It appears to me that I should be straining the meaning of these words adversely to the common intention of the parties if I were to say that here there is a case of "wilful default" on the part of the vendors.

I do not propose to enter into any disquisition on the meaning of those terms, beyond saying, that I think the term "wilful" is a very good English word, although like many English words it is susceptible of various meanings, as may be found by looking at any dictionary. In considering the question of what is "wilful default," as I have already intimated, in my opinion, regard must be had to the nature of the contract, and the duties, reciprocal or otherwise, imposed by the contract upon the parties; and if the argument on the part of the purchaser were pressed to its legitimate extreme, it appears to me that a purchaser would scarcely ever be liable to pay interest under such a condition as this, because, as is well known, having regard to the title to land in this country, the most careful vendor cannot always be prepared to shew a perfect title in the first instance.

Mr. *Levett* said that the vendor must look at his own deeds. That proposition may be accepted, and it may be said that if he does not look at his deeds he is in default, and it is "wilful" default not to look at them. But that is not the point. So far as this part of the case is concerned, the question is the degree of attention, or the degree of examination, he must make, and the knowledge, too, that he must have in many cases of the construction of the instruments, and knowledge of law. I agree that there is no question of law on this title in any fair sense of the term. I agree that if the vendors had carefully examined the plan in question, they would have discovered what the purchaser did discover on the 16th of June, and might have discovered sooner had he cared to inspect earlier. But I think I should

(1) 5 D. M. & G. 527-529.

be straining the meaning of the term unfairly as against the vendors, if I said, that this omission on the vendors' part was "wilful default." I have said already, that I do not propose, although it is a very interesting subject, to pursue further the various arguments and the judgments in the cases that have been cited upon the meaning of that term. Speaking for myself, I am not much impressed by the substitution by way, not of definition, but of explanation, of some other terms, such as "spontaneous" or "voluntary"—terms of Latin origin—for the purpose of explaining the common English word "wilful." With these observations I conclude my judgment, holding that the vendors are entitled to the interest claimed.

W. C. D.

The purchaser appealed.

The appeal was heard on the 28th and 30th of April, 1894.

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Levett, Q.C., and *Vernon R. Smith*, for the purchaser, Appellant:—

It was impossible for us to complete on the 24th of June, for the vendors did not deliver their abstract as to that part of the property containing important frontages until the following day, the 25th; neither were the vendors in a position on the 24th to make the statutory declaration provided for by the 4th condition, the statements of title in that condition being contrary to the facts. Accordingly the ultimate delay up to the 29th of September, when the title was finally accepted, was owing to the "default" of the vendors, and as they had not taken the trouble to verify their statements by investigating their own title, that default must be regarded as "wilful." There was no time until the 29th of September when a prudent purchaser could have completed. A man who makes a statement to the public of his own title, and has the means of verifying that statement, is bound to inform himself of the correctness of it; and if, having that duty to perform, he neglects to perform it, that is "wilful default." The case comes precisely within the explanation of "wilful default" given by Lord *Bowen* in *In re Young and Harston's Contract* (1), and in the judgment of the Court of Appeal

( ) 31 Ch. D. 168, 174-5.

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delivered by Lord Justice *Lindley* in *In re Hetling and Merton's Contract* (1). The vendors' default lay, not in making the statements they did, but in failing to inquire before making them. Choosing not to make the investigation, but to trust to memory without taking the trouble to verify the statement was an exercise of the will, thus making the default "wilful." It is said that the default was inadvertent: but that is immaterial, for neglect or default may be "wilful" though it may have been unintentional and have arisen from forgetfulness: *Elliott* v. *Turner* (2). To say that a vendor in default is nevertheless entitled to interest, is to say that he is to get the benefit of his own wrong and profit by his own breach of contract. The true rule is that, under such a condition as this, the purchaser is only liable to pay interest from the time a good title is shown: *De Visme* v. *De Visme* (3). The observations of Lord *Romilly*, in *Sherwin* v. *Shakspeare* (4), cover the case. He says: "If the delay were the result of gross negligence, or if the difficulty in the title was such, that the vendor, if he had been so minded, might have remedied it, he shall not, by reason of his negligence, obtain a larger amount of interest from the purchaser than he would otherwise have been entitled to."

It was contended in the Court below that we cannot be relieved from interest because we were not ready with our purchase-money: but it was held in *De Visme* v. *De Visme* that where a vendor fails to make a good title until long after the specified time for completing, and so himself commits a breach of the contract, the purchaser is not bound to pay his purchase-money or have it ready until a good title is shown, and his liability to interest only runs from that time; it is in accordance with that rule that we have paid interest from the 29th of September.

Whitehorne, Q.C., and *A. J. Allen*, for the vendors, Respondents:—

First, the delay in completion was not exclusively attributable to the vendors. Although the purchaser was informed as far

(1) [1893] 3 Ch. 269, 279.
(2) 13 Sim. 477.
(3) 1 Mac. & G. 336.
(4) 17 Beav. 267, 273; on appeal, 5 D. M. & G. 517.

back as the 28th of April that the plan mentioned in the Act of 5 Geo. 4 could be inspected, it was not until the 16th of June that he proceeded to do so; that is, he chose to wait until close upon the date fixed for completion. The delay was therefore attributable partly to the purchaser's own neglect. Then, it is not denied that the purchaser had not his purchase-money ready by the day fixed; and there is no reported case in which a purchaser has been relieved from payment of interest under a condition of this kind except where he has his purchase-money ready. In *De Visme* v. *De Visme* (1) and *In re Young and Harston's Contract* (2) the purchaser had his money ready.

Secondly, there has been no such "wilful default" on the part of the vendors as is aimed at by this condition. It is not denied that the statements in the 4th condition were made by inadvertence. "Wilful" default is inapplicable to a case of this kind. To be "wilful" the default must have been made, not merely by an exercise of the will, but by an exercise of the will coupled with knowledge of the facts in respect of which default has been made, as in *In re Young and Harston's Contract.* If ignorance of the facts exists, then there is an absence of one of the essentials of "wilful default." "Wilful default" means—like "wilful misconduct"—default to which the will is a party, something opposed to accident or negligence: *Lewis* v. *Great Western Railway Company* (3).

An innocent or honest mistake cannot be "wilful default." An accidental defect in title does not exempt the purchaser from such a condition as this: *Sherwin* v. *Shakspeare* (4). The intention of such a condition in the contract shews that the possibility of delay arising no less on the vendors' than on the purchaser's part is from the first contemplated by both parties, so that there is no hardship on the purchaser in holding him to the contract: *Fry* on Specific Performance (5); *Greenwood* v. *Churchill* (6). It may be, in a sense, a default on the part of the vendor not to have his title ready, but it has long been settled that the mere existence of difficulties as to the title, justifying the purchaser

(1) 1 Mac. & G. 336.
(2) 31 Ch. D. 168, 174-5.
(3) 3 Q. B. D. 195, 206.
(4) 17 Beav. 267, 274.
(5) 3rd Ed. p. 627, § 1417
(6) 8 Beav. 413.

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in refusing to complete until they are removed, does not exempt him from this condition: *Williams* v. *Glenton* (1).

Levett, in reply:—

As to the argument that the purchaser has contributed to the delay by his own negligence, it is no answer to an action for rescinding a contract on the ground of misrepresentation to say that the person to whom the misrepresentation was made had the means of discovering, and might with reasonable diligence have discovered, that it was untrue: *Redgrave* v. *Hurd* (2). Here no title was made by the vendors on the 24th of June, the day they themselves fixed for completion. In *Sherwin* v. *Shakspeare* (3) Lord *Romilly* expressly mentions as an alternative entitling the vendor to interest that the defect must be proved to be one which "the vendor could not have guarded against." That covers my case, for that is an alternative which has not been proved here. The vendors could have discovered their mistake if they had taken the trouble to do so. Carelessness is itself "wilful default." As to *Lewis* v. *Great Western Railway Company* (4), a distinction is to be drawn between misconduct and default: misconduct imports something active—commission as distinguished from omission. If default arises from the voluntary act of a party either awake or asleep with reference to his rights and interests the default is wilful: *Elliott* v. *Turner* (5). When there is a duty to perform—as where a vendor is bound to verify a statement before making it—the will must necessarily come into action; that is to say, the person on whom the duty lies must will either to perform that duty or not; if he does not will to perform it, that is "wilful default."

1894. May 10. LINDLEY, L.J.:—

This is an appeal by a purchaser from an order of Mr. Justice *Chitty*, directing him to pay interest on his purchase-money according to certain conditions of sale. By these conditions the purchase was to be completed on the 24th of June, 1892, and

(1) Law Rep. 1 Ch. 200, 206.
(2) 20 Ch. D. 1.
(3) 17 Beav. 267, 274.
(4) 3 Q. B. D. 195.
(5) 13 Sim. 477, 485.

"if from any cause whatever, other than wilful default on the part of the vendors," the purchase-money was not then paid, it was to bear interest at 5 per cent. It is obvious from the language of this condition that a distinction is intended to be drawn between defaults on the part of the vendors which are "wilful" and those which are not; and that interest is to be payable, even although there may be some default non-wilful on the part of the vendors, and some delay in the completion of the purchase occasioned by such default. In order to exonerate the purchaser from liability to pay interest, he must prove some "wilful default" on the part of the vendors which caused delay in the completion of the purchase. Proof by the purchaser that he could not prudently complete the purchase by the day named owing to some difficulty arising on the investigation of the vendors' title, is not of itself enough to exonerate the purchaser from payment of interest, for it is quite possible that the difficulty may not be owing to any wilful default on the part of the vendors. Lord *Cottenham's* observations on this subject in *De Visme* v. *De Visme* (1), were corrected in *Sherwin* v. *Shakspeare* (2); and ever since that decision the Courts have always recognised the distinction between wilful and non-wilful defaults in dealing with conditions of sale worded like that before us.

The meaning of the term "wilful default" in conditions of this kind was carefully examined in *Williams* v. *Glenton* (3), *In re Young and Harston's Contract* (4), and *In re Hetling and Merton's Contract* (5); but none of those cases quite cover the present case, as there was not in them, as there was here, a misstatement by the vendor of the nature of his own title. This misstatement arose from a very natural, though unfortunate, oversight of the vendors' agents. The property sold all belonged to the vendors, and they had for years been in possession of it, and their title was in fact free from all objections; and their solicitors, who are responsible for the preparation of the particulars and conditions of sale, knew this to be the case. Their knowledge of the goodness of the title led them to be less careful than they

(1) 1 Mac. & G. 336.
(2) 5 D. M. & G. 517.
(3) Law Rep. 1 Ch. 200.
(4) 31 Ch. D. 168.
(5) [1893] 3 Ch. 269.

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otherwise would have been in describing it. They described it thus in condition 4. [His Lordship read the condition, and proceeded:—] Now this statement was incorrect. The great bulk of the property had been acquired nearly fifty years ago under the statute referred to. But about one-tenth of it was acquired considerably later, twenty-six or twenty-seven years ago, and for the last quarter of a century both portions had been thrown together and used as one market-place. Unfortunately, the title was not examined, or not examined with proper care, before the conditions of sale were framed. This was unquestionably a default, but, in my opinion, it was not "wilful." I do not propose to examine this word with scientific accuracy; it is sufficient to observe that to make up one's mind not to verify a statement is "wilful," but that simply not to think about verifying it is not wilful.

I am aware that in *Elliott* v. *Turner* (1), Vice-Chancellor *Shadwell* expressed the opinion that forgetfulness might amount to wilful default. The case before him was, however, of a very different kind from the present. I confess that I am more disposed to concur with Lord *Bramwell's* observations on the term "wilful misconduct" in *Lewis* v. *Great Western Railway Company* (2). They are, in my opinion, quite consistent with Lord *Bowen's* observations in *In re Young and Harston's Contract* (3), if it be borne in mind that Lord *Bowen* presupposed knowledge of what was done, and intention to do it, and was not addressing himself to a case of an honest mistake or oversight. No doubt the statements contained in the 4th condition were deliberate, and to that extent "wilful"; but the misstatement was not "wilful." It arose from this, that, owing to the fact that the market-place had for years been one property, the necessity for verifying the statement never occurred to the vendors or their agents. I cannot hold that this omission was under the circumstances a "wilful default."

The conclusion thus arrived at is sufficient to dispose of this appeal. But the case is very near the line, and therefore I will add that, the more closely the facts are investigated, the more

(1) 13 Sim. 477. (2) 3 Q. B. D. 206.
(3) 31 Ch. D. 168.

reason there is for coming to the conclusion that the real cause of the delay in completing the purchase was the inability of the purchaser to find the purchase-money. The fact that he did not and could not complete the purchase for months after all difficulties in making out a title were cleared up, throws a strong light on the purchaser's alleged ability to complete on the day originally fixed for completion. The vendors' default is seized on as justifying the delay; but I am not at all satisfied that such default was the real cause of the delay. Mr. Justice *Chitty* did not believe that it was; nor do I.

The appeal must be dismissed with costs.

LOPES, L.J. (after stating the facts, continued):—

Conditions with regard to payment of interest are framed in different ways. They sometimes make interest payable if delay arises from any cause whatever, or if delay arises through the purchaser's default, or if completion is delayed from any cause whatever, other than wilful default on the part of the vendors. It is the last form of condition which the Court has to consider in this case. I am clearly of opinion that there was default by the vendors. They made a positive and specific representation that the whole of the property was held under a statutory power contained in a specified Act of Parliament. This was not the fact; one-tenth of the property sold was not comprised in that statutory title. This the vendors might have ascertained, if they had verified by proper investigation the documents in their possession. It was reasonable in the circumstances that they should have done this: they omitted to do something which it was their duty to have done, having regard to the positive statement they undertook to make, and having regard to their relations with intending purchasers.

There was, therefore, "default"; but it must be "wilful" and have caused delay in completion, in order to exonerate the purchaser from payment of interest. Admittedly the fault was not intentional; it was an oversight, an oversight easily accounted for, having regard to the fact that the vendors had been in possession of the whole property for many years, and that nine-tenths of it was included in the statutory title, and the whole passed

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under the name of, and was regarded as, the *Farringdon Market.* It was an honest mistake, and unintentional. It seems to me a perversion of the word "wilful" to hold such a default "wilful." It was, as I have said, a default; but to describe it as "wilful" would be a misapplication of that qualifying epithet. There would be no distinction then between what was intentional and what was unintentional and accidental; both would be visited with the same consequences.

There are expressions in the judgment of Lord Justice *Bowen* in *In re Young and Harston's Contract* (1) which are relied upon. The learned Lord Justice, speaking of "wilful," says that nothing blameable is denoted; "it amounts to nothing more than this, that he knows what he is doing, and intends to do what he is doing, and is a free agent." I do not think the learned Judge was contemplating an honest oversight. He was dealing with a different case, where, two days before the time fixed for completion, the vendor left *England* without having executed the conveyance which was ready for his execution in the afternoon of the day fixed. Sir *James Hannen* says, "Our judgment is that where a man knowing that some act has to be done by him on the particular day, goes away in disregard of that obligation, he is guilty of default; and doing it intentionally, it is wilful within the terms of a contract of this kind." What the vendor did there was not regarded as a mistake, much less an honest or unintentional oversight. That case, in my judgment, is distinguishable from the present, and expressions applicable to that case are inapplicable here.

In *Lewis* v. *Great Western Railway Company* (2), Lord Justice *Bramwell* says (3)—defining "wilful" in connection with misconduct—"'Wilful misconduct' means misconduct to which the will is a party, something opposed to accident or negligence; the misconduct, not the conduct, must be wilful." This, to my mind, is a more accurate definition of "wilful" than that given by Vice-Chancellor *Shadwell* in *Elliott* v. *Turner* (4), where he says, "in my opinion the word, 'wilful,' can have no other meaning than 'spontaneous'; and, if the neglect or default in this case arose

(1) 31 Ch. D. 168, 173, 175.
(2) 3 Q. B. D. 195.
(3) 3 Q. B. D. 206.
(4) 13 Sim. 485.

from the voluntary act of the parties, either awake or asleep with reference to their rights and interests, and did not at all arise from the pressure of external circumstances over which they could have no control, I apprehend that the neglect or default was wilful."

It is difficult to lay down any general definition of "wilful." The word is relative, and each case must depend on its own particular circumstances. I cannot think the default here "wilful." But, even assuming there was wilful default, I am of opinion that the delay in the purchase was not fairly attributable to it. The delay arose from the fact that the purchaser was not ready with his purchase-money, which is evidenced by the fact that he did not complete till long after the 29th of September, and has paid interest for the interval between that day and the time of completion.

The appeal must be dismissed, with costs.

KAY, L.J.:—

The question is as to the meaning of "wilful default" in the usual condition of sale, that "if from any cause whatever, other than wilful default on the part of the vendors," the purchase-money (excepting the deposit) should not be paid on the 24th of June, 1892, the day fixed for completion, interest thereon at 5 per cent. should be paid by the purchaser. [His Lordship then stated the facts, and continued:—]

In this state of circumstances the vendors contend that there was no wilful default on their part. The misstatement, they say, was made by inadvertence; it was not a wilful misstatement. The purchaser answers, the default was not the misstatement, but the omitting to examine the Act and plan before making the statement, the Act and plan being all the time in the vendors' possession. This, the purchaser urges, was "wilful." If the vendors had examined the plan, and had omitted to observe that the Act did not include the frontage, that might have been inadvertence, not "wilful default." But no examination whatever was made. The vendors making such a statement had a duty to the purchaser to take care, by examining the plan, which was in their own possession, to avoid an inaccuracy. Instead of

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this, whoever framed these conditions trusted to his general idea of what the vendors' title was, and neglected to make a search to verify it.

The purchaser urges that this neglect was the default, and that the default was "wilful," because the person who made it willed not to make the search, which it was his duty to the purchaser to make, before making the positive statement in the condition. I am not able to find an answer to this argument which is satisfactory to my mind. If the vendors had not made the positive statement as to all the land being held under the statute referred to, or if, having made it, they or their agent had taken some steps to verify it, and had in so doing committed a *bonâ fide* mistake, the case might have been different. But, according to the evidence, no attempt to verify the statement was made, and the omission to do this was not only a "default," but was a "wilful default," because it was a deliberate neglect of a duty to the purchaser which the vendors, by making the positive statement, voluntarily assumed.

But did this occasion the delay? Assuming that the vendors were in default, the purchaser voluntarily delayed from the 7th of May till the 16th of June to examine the plan; and, again, after the further abstract was delivered on the 25th of June, he sent in no requisitions until the 28th of July. There is no excuse for these delays, and the learned Judge found that the reason was a difficulty in obtaining the purchase-money. On this ground I am prepared to concur in his decision.

Solicitors: *H. H. Crawford, City Solicitor; Chapple, Welch, & Chapple.*

G. I. F. C.

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May 22.

[1894 C. 1268.]

Practice—Motion for Injunction by Defendant—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8—*Rules of Supreme Court,* 1883, *Order* L., *r.* 6.

A defendant who has not filed a counter-claim cannot apply for an injunction against the plaintiff, unless the relief sought by the injunction is incident to or arises out of the relief sought by the plaintiff. If the defendant desires any other relief before the time arrives for delivery of a counter-claim, he must issue a writ in a cross-action.

Sargant v. *Read* (1) and *Porter* v. *Lopes* (2) distinguished.

THIS was an appeal from a decision of Mr. Justice *Kekewich.*

The Plaintiff by his writ claimed a perpetual injunction restraining the Defendant from carrying on directly or indirectly the business of a wine, ale, and spirit merchant in the city of *Winchester* or within a radius of two miles. The writ was issued on the 11th of April, 1894, and on the same day the Plaintiff gave notice of motion for an interlocutory injunction to the same effect as the claim indorsed on the writ.

The Defendant appeared to the writ, and on the 17th of April, no statement of claim having been filed and no defence or counter-claim having been put in, he gave cross-notice of motion for an interlocutory injunction restraining the Plaintiff from using the name of the Defendant on vans, signboards, or labels, or otherwise, in carrying on his business.

Both motions came on together for hearing before Mr. Justice *Kekewich* on the 27th of April. It appeared from the affidavits that the Plaintiff and Defendant had been partners as wine, ale, and spirit merchants, but their partnership had been dissolved on the 12th of May, 1893, upon the terms stated in a deed of dissolution of that date. It was stipulated (among other things) in the deed, that the name of the Defendant should be expunged from the name of the firm on all signboards, labels, and other advertisements; and that the Defendant should not for the space of five years carry on, directly or indirectly, the business of a

(1) 1 Ch. D. 600. (2) 7 Ch. D. 358.

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wine, ale, and spirit merchant in the city of *Winchester*, or within a radius of two miles.

Mr. Justice *Kekewich* refused the Plaintiff's motion, making the costs costs in the cause; and he also dismissed the Defendant's motion with costs, being of opinion that he had no jurisdiction to entertain the application until the Defendant had either put in a counter-claim or issued a writ in a new action.

The Defendant appealed from the order dismissing his motion.

Le Riche, for the Appellant:—

The learned Judge did not allow the Defendant to go into the circumstances which rendered it equitable that the Plaintiff should be restrained from using his name, but decided against him on the preliminary objection that he could not apply for an injunction without filing a writ in a cross-action. But this is contrary to *Sargant* v. *Read* (1), where the late Master of the Rolls held that it was regular for the defendant in a partnership action to move for an injunction and receiver. In *Porter* v. *Lopes* (2), also, a receiver was appointed on the motion of the defendant in a partition action. The *Judicature Act*, 1873, s. 24, sub-s. 7, gives full power to the Court to grant all remedies which any of the parties may appear to be entitled to in order to determine all matters in controversy between the parties and to avoid multiplicity of proceedings. And sect. 25, sub-sect. 8, gives power to grant an injunction by interlocutory order "in all cases in which it shall appear to the Court to be just or convenient that such order should be made." Then Order L., rule 6, provides in perfectly general terms that an application under sect. 25, sub-sect. 8, may be made to the Court or judge by any party, and that if made by any party other than the plaintiff, it may be on notice to the plaintiff at any time after appearance by the party making the application. There is no doubt that if the Defendant waited till the time for putting in his defence, he might put in a counter-claim and then move for an injunction; but that would cause great delay, and the Defendant might be seriously injured by the delay. And if he were to issue a fresh writ,

(1) 1 Ch. D. 600. (2) 7 Ch. D. 358.

additional expense and multiplicity of litigation would be caused which it was the intention of the *Judicature Act* to avoid. The new writ would be nothing but a repetition of the notice of motion which is now given, and would be a perfectly useless formality.

S. Dickinson, for the Plaintiff:—

The cases cited do not support the Defendant's contention. *Sargant* v. *Read* (1) was an action for dissolution and taking the accounts of a partnership, and the receiver was applied for in order to secure the property which formed the subject of the plaintiff's action. Therefore, the claim of the defendant arose out of the plaintiff's cause of action. A similar observation applies to *Porter* v. *Lopes* (2), which was a partition action, and a receiver was appointed to protect the property. But in the present case the Defendant's claim for an injunction has nothing to do with the Plaintiff's claim, or with any issue which will be tried in the action. There is no precedent for such an application by a defendant.

Le Riche, in reply.

LINDLEY, L.J.:—

This appeal raises a point of practice of some difficulty, which is new and certainly important. The question is whether a defendant who is in a hurry is entitled to apply by way of motion in the plaintiff's action for an injunction without waiting to deliver a counter-claim or issuing a writ in a cross-action, where the relief which he seeks is not in any way comprised in or incidental to the plaintiff's cause of action. In the present case the Plaintiff only claims an injunction to restrain the Defendant from carrying on a business within a certain limit. It is not a partnership action; it is not an action for taking the partnership accounts, or for preserving the partnership assets; it is simply an action to restrain the Defendant from carrying on a business in contravention of one of the covenants of the deed of dissolution. The Plaintiff moved for an injunction in terms

(1) 1 Ch. D. 600. (2) 7 Ch. D. 358.

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of the covenant; and the Defendant met the Plaintiff's motion by affidavits that the Plaintiff was not entitled to relief because he had himself broken his covenant not to use the Defendant's name in his business; and he not only did this, but he gave notice of motion for an injunction to restrain the Plaintiff from using his name. When the Defendant's motion was opened before Mr. Justice *Kekewich*, it was met by the preliminary objection that it was not competent to the Defendant to make such a motion at that stage of the proceedings; and the learned Judge upheld the objection. The question is whether his decision was correct. The Defendant's claim is not for any relief arising out of or incidental to the relief sought to be obtained by the Plaintiff in his action. In this respect the case differs from *Sargant* v. *Read* (1), which was an action for dissolution of a partnership and for taking the partnership accounts, and Sir *G. Jessel* there held that the defendant was entitled to give a cross-notice of motion in the plaintiff's action for the appointment of a receiver. It differs also from *Porter* v. *Lopes* (2), which was a partition action, and there the defendant was held entitled to move for a receiver for the protection of the property. In the present case the cross-notices have nothing to do with each other, except that they are both based upon covenants contained in the same deed; but the covenants are quite distinct. The Defendant says that if he were not in a hurry he might put in a counter-claim, and by it claim such an injunction as he asked for in his motion. Assuming that he could do so, can he now ask for an injunction without a counter-claim and without issuing a writ of his own? He relies upon Order L., rule 6, where it is provided that an application for an injunction may be made to the Court or a Judge by any party, and if it be made by the plaintiff it may be made either *ex parte* or by notice, and if it be made by any other party, then on notice to the plaintiff, and at any time after appearance by the party making the application. That rule at first sight appears to favour the Defendant's contention; but if the Defendant is right, it would be equally competent for a plaintiff to ask for an injunction for something outside the subject-matter of his action. If the Defendant's application for

(1) 1 Ch. D. 600. (2) 7 Ch. D. 358.

an injunction were in any way connected with or incidental to the object and purpose of the Plaintiff's action, he would have good ground for his contention; but it has really nothing to do with the relief sought by the Plaintiff, and therefore, in my opinion, the Defendant is wrong. If he cannot wait till the time for delivering a counter-claim, he must issue a writ in an action of his own. So far as I am aware, this is the first time that such an application has been made, and the experiment must in my opinion fail, and the appeal must be dismissed with costs.

LOPES, L.J.:—

This is an appeal raising an important question of practice under Order L., rule 6. The question is this—whether the Defendant can move for an injunction against the Plaintiff without filing a counter-claim or issuing a writ in a cross-action. In my opinion, he can in some cases, but only in cases where the defendant's claim to relief arises out of the plaintiff's cause of action, or is incidental to it. *Sargant* v. *Read* (1) and *Porter* v. *Lopes* (2) are cases of that description. But if the relief asked by the Defendant is not connected with the subject-matter of the Plaintiff's claim and relates to nothing that is the issue in the Plaintiff's action, but is outside of the action altogether, then, in my opinion, the Defendant cannot move for an injunction without a counter-claim or a new writ. It may be that, there being no statement of claim, he is not in a position to put in a counter-claim; in that case, if time is important to him, he must issue a writ. In the present case it appears clear to me that the Defendant is seeking to obtain relief which is distinct from that which is claimed by the Plaintiff in the action, and I agree that the appeal must be dismissed.

DAVEY, L.J.:—

It may or may not have been wise on the part of the Legislature to require a plaintiff to issue a writ stating in general terms the nature of the relief claimed before moving for an injunction; but the Legislature has so required. Mr. *Le Riche*, however, contends that a defendant is in a better position than a plaintiff,

(1) 1 Ch. D. 600. (2) 7 Ch. D. 358.

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and that he may move for an injunction without converting himself into a plaintiff by filing a counter-claim or issuing a writ. For example, if an action is brought against a defendant for breach of trust, can the defendant move for an injunction to restrain the plaintiff from libelling him by publishing a statement that he, the defendant, cheated at cards? Mr. *Le Riche* says that he can, relying upon sect. 25, sub-sect. 8, of the *Judicature Act*, 1873, and Order L., rule 6, of the Rules of the Supreme Court; and contending that the words of the rule should be construed to apply to any injunction that the defendant deems himself entitled to. I do not agree with that construction. In my opinion, it must be relating to or arising out of the relief sought in the action which is before the Court, and that any other injunction cannot properly be granted in the action. The Defendant's cross-motion in the present case does not in my opinion fulfil that condition; it does not arise out of the relief sought in the only action which is before the Court. The case relied on, namely, *Sargant* v. *Read* (1), illustrates the difference very well. There the relief sought by the defendant did directly arise out of the relief claimed by the plaintiff in his action, and the object of the motion was to preserve the *status quo* of the property which was the subject-matter of the action until the trial. It is strange that if Mr. *Le Riche* is right in his contention, he could not find a single case to support his argument. The *Judicature Act* has been in force for nearly twenty years, and yet there has been no case in which relief such as that now asked has been sought by a defendant until he has made himself an actor in the litigation either by filing a counter-claim or issuing a writ. I agree that the appeal fails, and must be dismissed.

Solicitors: *Ordolph Wheable*, agent for *Scotney & Shenton, Winchester; W. H. Hales.*

(1) 1 Ch. D. 600.

M. W.

WALLACE *v.* UNIVERSAL AUTOMATIC MACHINES COMPANY.

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KEKEWICH, J.
March 10, 14.
C. A.
May 5, 28.

[1890 W. 2058.]

Company—Debenture—Floating Security—Covenant for Payment on Specified Day—Winding up of Company before such Day.

Where a debenture, issued by a company by way of floating security, contains a covenant for payment of the principal money on a specified day, though without any stipulation making the money immediately payable in the event of a winding-up, the occurrence of a winding-up before the specified day renders the money immediately payable, and entitles the debenture-holder at once to realize his security for the full amount of principal, interest and costs.

Hodson v. *Tea Company* (1) approved of.

Judgment of *Kekewich*, J., varied.

THE *Universal Automatic Machines Company, Limited,* was formed and registered under the *Companies Acts* in September, 1887; its object being to acquire and work certain patents. It had power to borrow money on debentures, and shortly after its incorporation it raised £6000, at 6 per cent. interest, on sixty debentures of £100 each.

The Plaintiff was the registered holder of five of these debentures.

The debentures, each of which was in the same form, contained covenants on the part of the company to pay to the registered holder thereof the principal sum of £100 thereby secured on the 31st of December, 1894, and to pay interest at the rate of 6 per cent. per annum on the principal sum half-yearly on the 1st of January and the 1st of July. And the company thereby charged with the payment of such principal and interest all the undertaking and property of the company both present and future, to the intent that all the debentures of the series (which was limited to 250 debentures of £100 each) should, without regard to the respective dates thereof, rank *pari passu* as a first charge upon the said undertaking and property without any preference or priority one over another, and that such charge

(1) 14 Ch. D. 859.

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should be a floating security, "and accordingly is not to prevent or hinder the company from leasing, exchanging, selling, mortgaging, or otherwise dealing with the property as it may from time to time think fit."

The debentures contained no condition or provision making the principal money payable on default in payment of interest, or in the event of the winding up of the company.

The company made default in payment of the half-year's interest due to the Plaintiff on his debentures on the 1st of January, 1890; and on the 2nd of July, 1890, he issued the writ, in this action, on behalf of himself and all other the holders of the debentures, for an account and a receiver. On the 19th of July, 1890, an order was made for the winding up of the company by the Court.

The Plaintiff delivered his statement of claim on the 5th of July, 1894, and thereby alleged that "the whole of the principal moneys secured by the Plaintiff's debentures amounting to £500, together with interest thereon from the 1st of July, 1889, are still unpaid and owing to the Plaintiff"; and he claimed a declaration of charge, an account, and the enforcement of the charge by foreclosure or sale.

The action was then set down for hearing as a short cause upon motion by the Plaintiff for judgment on default of defence.

The action came on for hearing before Mr. Justice *Kekewich* on the 10th of March, 1894.

Eve, for the Plaintiff, asked for judgment in the terms of minutes which had been prepared, and which contained a declaration that the Plaintiff and all other the holders of the debentures in the statement of claim mentioned were entitled to a charge on all the undertaking and property of the Defendant company for securing the principal moneys and interest owing upon the security of the said debentures; an inquiry what debentures had been issued by the Defendant company, and which of them were still outstanding and unpaid, and what persons were the holders of the same respectively; and an account of what was due for principal and interest to the Plaintiff and the other holders of the said outstanding debentures.

[KEKEWICH, J., objected that, inasmuch as the day specified for payment of the principal moneys, viz., the 31st of December, 1894, had not yet arrived, the allegation in the statement of claim that the principal moneys were owing was incorrect, and the Plaintiff was not entitled to any relief founded on the truth of such allegation.]

Eve relied on *Hodson* v. *Tea Company* (1) as an authority to shew that upon the winding up of the company the arrangement for the continuance of the loan for a certain time necessarily came to an end, and the money secured by the debentures became immediately payable.

[He referred also to *Palmer's* Company Precedents (2).]

The company did not appear.

KEKEWICH, J., said that he was not satisfied that the case cited established the proposition contended for, and that he would take time to consider the matter.

1894. March 14. KEKEWICH, J.:—

When this case came before me on Saturday, I took objection to the allegations in the statement of claim upon which the Plaintiff is proceeding. It is there stated that the Plaintiff is the holder of certain mortgage debentures which are payable on the 31st of December, 1894—a day which, of course, has not yet arrived. Interest is payable half-yearly, on the 1st of January and the 1st of July; and the allegation in the statement of claim is that no interest has been paid. The debentures are stated to be a charge of the principal and interest on the undertaking of the company, both present and future, and they are to be a floating security. Then the statement of claim goes on to allege this: "The whole of the principal moneys secured by the Plaintiff's debentures amounting to £500, together with interest thereon from the 1st of July, 1889, are still unpaid and owing to the Plaintiff." The interest is not only unpaid, but is payable and owing; but I took exception to the allegation that the principal money was "owing." In reply to that objection on my part,

(1) 14 Ch. D. 859. (2) 5th Ed. p. 495.

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Kekewich, J.

Mr. *Eve* referred me to the case of *Hodson* v. *Tea Company* (1), where Vice-Chancellor *Hall* said (2): "It appears to me that, when a company comes to be wound up, the arrangement for the continuance of the loan for a certain time necessarily comes to an end—the money becomes immediately payable, and the security immediately enforceable." In that case, apparently, as in this, there was no condition, as is now common, for the principal money becoming payable on default made in payment of interest, or in the event of a winding-up. I am told that in this case it is a mere slip that the condition was omitted from the debentures; but they were in fact issued without any such condition. If I could accept the statement of the Vice-Chancellor, which I have just read, I should hold here that the money is payable and owing. But, upon consideration, I do not feel at liberty to accept it. It was not necessary for the decision, it is unsupported by any other authority, and it is, to my mind, inconsistent with what I understand to be the law. I therefore do not feel bound to follow the Vice-Chancellor's *dictum*, notwithstanding that it is fourteen years old. I do not see myself why, where there is a covenant to pay upon a certain day not yet arrived, that covenant becomes enforceable as for a debt payable *in præsenti* because there is a winding-up. If this had been a covenant by a man to pay the money in December, 1894, his bankruptcy would not have made the money presently payable; and I cannot see any distinction for this purpose between bankruptcy and a winding-up. It may be some disadvantage to the creditor, but I cannot see why the money is payable *in præsenti*. It is *debitum in præsenti, solvendum in futuro*. Mr. *Eve* referred me to Mr. *Palmer's* valuable book, and I find it says this (3): "As regards making the principal payable in the event of a winding-up: such a provision is now very common, and, while it can do the company no harm, may prevent disputes as to the rights of the debenture-holder. According to a recent decision, it only expresses that which the law implies: *Hodson* v. *Tea Company*." Of course, I cannot accept Mr. *Palmer's* approval of *Hodson* v. *Tea Company*; but, if that decision had the approval of the profession,

(1) 14 Ch. D. 859. (2) 14 Ch. D. 862.
(3) 5th Ed. p. 495.

I should feel more reluctant than I am to disregard it. There is another decision—*In re Panama, New Zealand and Australian Royal Mail Company* (1)—where Lord Justice *Giffard* appears to me to put the law upon a sound footing. He says this (2): "The moment the company comes to be wound up, and the property has to be realized, that moment the rights of these parties, beyond all question, attach. My opinion is, that even if the company had not stopped, the debenture holders might have filed a bill to realize their security." To my mind there is all the difference in the world between "realizing a security" and suing on a covenant to pay, which this allegation here implies. The principle is also to be found in a series of cases, now dropped out of sight, of which *Yescombe* v. *Landor* (3) may be taken as a good example. In the *Judgment Act* (1 & 2 Vict. c. 110), there are provisions making it impossible for a judgment creditor to enforce his security until a certain time has elapsed; but that was interpreted by the Court in *Yescombe* v. *Landor* as giving the judgment creditor a right to an injunction to prevent trustees from paying over the rents of land to the judgment debtor, a tenant for life. The head-note to the case is this: "A judgment creditor, though unable to proceed in equity to obtain the benefit of his charge before the expiration of a year, is, nevertheless, entitled to have the life interest of his debtor in lands at once impounded for his protection." And there are other cases about the same time applying the same principle. In my opinion the debenture-holder here is entitled to a judgment which will protect him and prevent the company from reaping any benefit from the property charged; but he is not entitled to anything in the nature of payment of the money on the footing of the covenant.

When I looked through the minutes I found that, after all, there was very little which needed alteration. The Plaintiff proposes to take a declaration of charge. I see no objection to that. He may have the words "for payment of the principal moneys and interest intended to be secured," or words of that kind. The words "and unpaid" in the inquiry as to the

(1) Law Rep. 5 Ch. 318. (2) Law Rep. 5 Ch. 322-3.
(3) 28 Beav. 80.

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debentures issued must come out. Obviously there are none unpaid because none are payable. Then the words "principal and" in the account of what is due should be omitted.

C. C. M. D.

The Plaintiff appealed.

The appeal was heard on the 5th of May, 1894.

Eve, for the Appellant:—

The moment the winding-up commenced the whole of the money secured by the debentures became payable, the security being enforceable upon all the assets of the company as they existed at the date of the winding-up: *Hodson* v. *Tea Company* (1), where Vice-Chancellor *Hall* adopted the *dictum* of Lord Justice *Giffard* in *In re Panama, New Zealand, and Australian Royal Mail Company* (2). A winding-up may alter the original contract between the company and its debenture-holders, just as in the case of an advanced member of a building society which has been ordered to be wound up: *Brownlie* v. *Russell* (3). Under sect. 158 of the *Companies Act*, 1862, we may, if we choose, prove in the winding-up for the amount secured by the debentures, whether due or not; and the rules in bankruptcy as to secured and unsecured creditors would apply: *Judicature Act*, 1875, s. 10. But we are not seeking to prove our debt in the winding-up; we prefer to realize our security, and repay ourselves the principal money out of the proceeds, although the date fixed for payment has not yet arrived.

The decision in *Hodson* v. *Tea Company* is recognised in all the text-books.

1894. May 28. LINDLEY, L.J.:—

This is an action by the holder of debentures charged on the undertaking and property of a limited company which is being wound up, for the realization of his security; and the question raised by this appeal is whether, for the purpose of realizing such security, the principal moneys secured by the debentures, and thereby made payable at a future date, can be treated as if

(1) 14 Ch. D. 859. (2) Law Rep. 5 Ch. 318, 322.
(3) 8 App. Cas. 235.

they had become due at the date of the commencement of the winding-up.

The facts are simple. [His Lordship stated them, and continued:—]

The Plaintiff is not content with the judgment of Mr. Justice *Kekewich*, as no account is directed of what is due in respect of the principal sums secured to him by the debentures, and he has appealed in order to have the judgment corrected in this respect.

The time for the payment of the principal not having yet arrived, it is clear that it is not a debt for which any action at law can now be brought. But it is equally clear that, as the company is being wound up, the Plaintiff and the other debenture-holders can, if they choose, prove against the company in respect of all the moneys secured by the debentures, whether due or not: see the *Companies Act*, 1862, s. 158.

Moreover, by the *Judicature Act*, 1875, s. 10, if the debenture-holders did so prove, they would have to give up their securities, and they could only prove for such amount as would be provable if the company had been a debtor, and had been adjudicated bankrupt. The amount provable in bankruptcy in respect of a future debt bearing interest was determined in *Ex parte Ador* (1).

The Plaintiff, however, is not seeking to prove his debt, nor is he bound to do so. On the other hand, he is not content simply to rest on his security, nor is he content to have his interest kept down. He wants to realize his security and to apply its proceeds in paying off the principal and interest, although the time fixed for paying off the principal has not yet arrived. The undertaking, on the security of which the money was borrowed, has in fact come to an end by the winding-up; and this circumstance entitles the debenture-holders to realize their security at once. This point was determined in *Hodson* v. *Tea Company* (2), which was itself based on the earlier case of the *Panama Company* (3).

In *Hodson's Case* the debenture was not due, but it was treated as having become due on the commencement of the winding-up

(1) [1891] 2 Q. B. 574. (2) 14 Ch. D. 859.
(3) Law Rep. 5 Ch. 318.

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of the company, and accounts were directed of what was due for principal and interest on that footing. The principle on which this decision is founded is, in my opinion, correct, and the Plaintiff is, in my judgment, entitled to an order giving effect to it. The order appealed from must be varied accordingly, and the costs must be added to the amount due to the Plaintiff on his security. The Lord Justice *Kay* has framed a declaration which should, I think, be embodied in the order so that its principle may be made clear.

I am desired by the Lord Justice *Lopes* to say that he has read this judgment and concurs in it.

KAY, L.J. (after stating the facts, continued):—

The question is whether the debenture-holders can claim, as against the security, the full amount of their principal, although the day fixed for payment has not arrived, or whether they must be satisfied with interest only till the day of payment, or with the principal subject to a discount for payment before the day on which the principal becomes due. It is material to observe that it is not a question of proof in the winding-up, but of realization of the security. By the winding-up order the position of the debenture-holders is very much altered. The subject of their security is, amongst other things, the undertaking; that is, the profit-producing concern. The winding-up practically puts an end to any chance of producing further profits. The security is a floating charge; that is, the company might use all its assets included in the security for the purposes of its *bonâ fide* business as though the charge did not exist. These powers are, to some extent, vested in the liquidator for the purposes of winding up the company. If the debenture-holders were compelled to wait until the debentures became due, the security might, and probably would, be very much depreciated in the meantime. These considerations lead to the conclusion expressed by Lord Justice *Giffard* in the case of the *Panama Company* (1), that upon the occurrence of the winding-up the debenture-holders had a right at once to realize their security. It follows that, if the time of realizing is accelerated by this

(1) Law Rep. 5 Ch. 318.

event, the realization must be for the full amount, as though the debt was then due; and this seems to have been held in the same case. The same result was arrived at by Vice-Chancellor *Hall* in *Hodson* v. *Tea Company* (1).

I think there should be a declaration that, upon the occurrence of the winding-up, the debenture-holders became entitled to realize their security for the full amount secured by their respective debentures, notwithstanding that the day mentioned therein for payment of the capital had not arrived, and that an account should be directed of what is due for principal and interest to the time of actual payment on that footing, and for the costs of this action.

The other inquiries directed seem to be in the right form.

The costs of the appeal should be added to the security.

Solicitors: *Slaughter & May.*

G. I. F. C.

BUDGETT *v.* BUDGETT.

C. A.
1894
June 6.

[1891 B. 4196.]

Practice—Time for Appeal—Judgment in Action—Rules of Supreme Court, 1883, *Order* LVIII., *r.* 15—*Rules of Supreme Court,* 1893, *r.* 27—*Judgment before new Rule came into operation.*

The rule of November, 1893, limiting the time for appealing against judgments to three months, does not apply to a judgment perfected before that rule came into operation.

THE judgment in the above-mentioned action was given by Mr. Justice *Kekewich* on the 23rd of May, 1893, and was passed and entered on the 24th of August, 1893.

On the 2nd of June, 1894, *E. E. Meakin,* one of the Defendants, gave notice of application to the Court of Appeal for special leave to appeal from the judgment, being apprehensive that the time limited by the rules had expired. On the application coming on to be heard,

E. E. Meakin, appeared in person in support of the appeal.

(1) 14 Ch. D. 859.

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He referred to Order LVIII., r. 15, as amended by the order of November, 1893, r. 27 (1), which limited the time for appeal against a judgment in an action to three months, and contended that if the time for appeal in the case had expired there were circumstances in the case which justified an extension of the time.

Ingle Joyce, for the Plaintiff:—

The order referred to applies to judgments which had been passed and entered before the rule came into operation, that is, on the 1st of January, 1894. There is no hardship in such a rule as this having a retrospective operation. With regard to the present application the Applicant has shewn no grounds for indulgence.

Bunting, and *Chaster*, for other parties.

LINDLEY, L.J.:—

We are of opinion that the new rule does not apply to the judgment in this case, as it was passed and entered before the Orders of November, 1893, came into operation. The Applicant has, therefore, a right to appeal, and his application for special leave is unnecessary and must be refused.

DAVEY, L.J., concurred.

Solicitors: *Ingle, Cooper, & Holmes; Foss & Ledsam.*

(1) Rules of Supreme Court, 1883, Order LVIII., r. 15: "No appeal to the Court of Appeal from any interlocutory order, or from any order, whether final or interlocutory, in any matter not being an action, shall, except by special leave of the Court of Appeal, be brought after the expiration of twenty-one days, and no other appeal shall, except by such leave, be brought after the expiration of one year."

Rules of Supreme Court (November, 1893), r. 27: "In Order LVIII., r. 15, 'fourteen' shall be substituted for 'twenty-one' and 'three months' for 'one year.'"

By rule 32 it was provided that the last-mentioned rules should come into operation on the 1st of January, 1894.

M. W.

In re BUDGETT.
COOPER *v.* ADAMS.

[1894 B. 1808.]

CHITTY, J.
1894
May 30, 31.

Partnership—Bankruptcy—Administration of Joint and Separate Estates—Joint Debt—No Joint Estate—Proof against Separate Estate of Partners—Bankruptcy Act, 1883 (46 & 47 *Vict.* c. 52), s. 40, *sub-s.* 3.

The *Bankruptcy Act,* 1883, s. 40, sub-s. 3, which embodies the rule as to the distribution of joint and separate estates laid down by Lord *King* in *Ex parte Cook* (1), and adopted by Lord *Loughborough's* Order of 1794, does not affect the long-established exception to such rule, viz., that it does not apply where there is no joint estate.

If in the case of a bankrupt firm there is no joint estate, a joint creditor is still entitled to have his debt paid out of the separate estates of the individual partners, *pari passu* with the separate creditors.

In re Carpenter (2) discussed and followed.

ADJOURNED SUMMONS.

This was an application by the trustee of a deed of assignment for the benefit of creditors to determine the question whether, since the passing of the *Bankruptcy Act,* 1883, the joint creditor of a bankrupt firm could still compete with the separate creditors against the separate estate of the individual partners, where there was no joint estate.

The facts, so far as material for the purposes of this report, were as follows:—

In January, 1891, *D. N. Adams* lent £1500 to the firm of *S. Budgett & Son,* which then consisted of a father and his eldest son. Shortly afterwards another son was taken into partnership, and all the assets and joint estate of the old firm were transferred to the new firm, which also took over all the old firm's liabilities. *D. N. Adams* was no party to this arrangement, and remained a creditor of the old firm only, it being admitted that there was no novation.

In October, 1892, the individual members of the new firm executed an assignment of all their joint and separate estate to a trustee for the benefit of their creditors, to be distributed in

(1) 2 P. Wms. 500. (2) 7 Morrell, 270.

CHITTY, J.
1894
In re BUDGETT COOPER *v.* ADAMS

the same way as if the new firm were bankrupt. *Adams* was admitted to prove; but there being no joint estate of the old firm, he claimed to be entitled to have his debt paid out of the separate estates of the father and eldest son, on an equality with their separate creditors. It was for the determination of this question that the summons was taken out.

C. E. E. Jenkins, for the trustee:—

Prior to the passing of the *Bankruptcy Act*, 1883, the rule that the separate estate of each partner should, in the first instance, be applied to the payment of his separate debts, was subject to an exception where there was no joint estate; but the exception no longer exists; the rule as to the distribution of joint and separate estates laid down by Lord *King* in *Ex parte Cook* (1) and embodied in Lord *Loughborough's* Order of the 6th of March, 1794 (2), had engrafted upon it by a series of decisions some well-recognised exceptions, one of which was, that the Order did not apply against joint creditors where there was no joint estate. Subsequent bankruptcy legislation as to joint creditors down to 1883 has not touched or dealt with this exception or embodied the terms of Lord *Loughborough's* Order. Neither 6 Geo. 4, c. 16, s. 62; 12 & 13 Vict. c. 106, s. 140; nor the *Bankruptcy Act*, 1869 (32 & 33 Vict. c. 71), s. 103, made any statutory alteration of the law on this point; it is only by rule 76 of the *General Rules*, 1870, that Lord *Loughborough's* Order is repeated. The exception seems to have been recognised in 1852 in *Ex parte Kennedy* (3), and again in 1863 in *Lodge* v. *Prichard* (4). [*Cowell* v. *Sikes* (5) was also referred to.] Sect. 40, sub-sect. 3, and sect. 59 of the *Bankruptcy Act*, 1883, which for the first time embody in an Act of Parliament the substance of Lord *Loughborough's* Order, make no mention of this exception, and, considering the unsatisfactory grounds on which it was based (a few shillings of joint estate would prevent its application), and the disapproval with which it has occasionally met (see *Ex parte*

(1) 2 P. Wms. 500.

(2) 1 Mon. & Ayr. Law of Bankruptcy, 2nd Ed. p. 454, and *Williams'* Bankruptcy Practice, 6th Ed. p. 142.

(3) 2 D. M. & G. 228.

(4) 1 D. J. & S. 610.

(5) 2 Russ. 191.

Pinkerton (1)), my contention is, that the Legislature intended to put an end to the exception. Eminent text-writers are also of this opinion: *Robson's* Law of Bankruptcy (2): *Williams'* Bankruptcy Practice (3). Consequently *Adams'* claim to compete with the separate creditors cannot be allowed.

F. Thompson, for *D. N. Adams*:—

Sect. 40, sub-sect. 3, of the *Bankruptcy Act*, 1883, was only intended to apply, as Lord *Loughborough's* Order was intended to apply, to cases where there was joint estate; sect. 59 applies where one partner only is adjudged bankrupt; therefore that section has no bearing on the present case. Where there is no joint estate, the joint creditors are entitled to rank as separate creditors against the separate estates of the individual partners: *Ex parte Morris* (4); *Ex parte Bauerman* (5). The exception was admitted and adopted by *Turner*, L.J., in *Lodge* v. *Prichard* (6). The reasonable inference is, that the Legislature intended the law to remain as it was prior to the passing of the Act of 1883, and I have a right to refer to the previous state of the law for the purpose of ascertaining the intention of the Legislature.

[CHITTY, J.:—Yes, in a consolidating and amending Act such as the *Bankruptcy Act*, 1883, but not in an Act that codifies the existing law. See Lord *Herschell's* remarks in *Bank of England* v. *Vagliano* (7).]

Lindley on Partnership (8) states that it is apprehended the exception I rely on still exists; and *In re Carpenter* (9), which is since the 1883 Act, amounts to a decision that the old law is unaltered. On these grounds I contend that *Adams* is entitled to prove against the separate estates of the father and eldest son, as members of the old firm, in competition with their separate creditors.

Jenkins, in reply.

(1) 6 Ves. 814.
(2) 6th Ed. p. 736.
(3) 6th Ed. pp. 1, 143.
(4) Mont. 218.
(5) 3 Deac. 476.
(6) 1 D. J. & S. 610.
(7) [1891] A. C. 144.
(8) 6th Ed. p. 748.
(9) 7 Morrell, 270.

CHITTY, J.

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In re BUDGETT. COOPER *v.* ADAMS.

CHITTY, J. (after stating the facts, continued):—

The question turns on the 3rd sub-section of s. 40 of the *Bankruptcy Act*, 1883. It is not necessary for me to read this sub-section at length. I have had presented at the Bar a very learned argument tracing the history of this section back to the time of Lord *King*, and especially to the well-known Order of Lord *Loughborough* in 1794. I have that Order before me, and again I think it unnecessary to cite it at length. It was properly admitted by counsel for the trustee, that in substance the section is in the same terms as the Order. Now, in regard to the Order, the decisions settle the meaning of it, and again it is unnecessary to refer to the long course of decisions, and I may add the well-known administration in bankruptcy, with reference to that Order. According to the statements in the text-books (I am referring to *Lindley* on Partnership (1) by way of example) there were four exceptions allowed to the Order. It is not, I think, material to discuss the verbal question whether it is right to call them "exceptions," or whether it would not be more proper to say that there are four cases which did not fall within the Order. The latter phrase is clearly correct, and it is one which I propose to adopt without saying that the other term as to "exceptions" is not a proper one.

Now, the first of the cases not covered by the Order relating to the administration of joint and separate estates, and the application of them to joint and separate debts, is this, that where there is no joint estate, the rule does not apply; and the question really is, whether seeing that the language of the Legislature in sect. 40, sub-sect. 3, is practically the same as the language of Lord *Loughborough's* Order, the Court ought not to interpret the section in the same way as the Order. I have referred to the historical argument, and I would mention merely one point upon it. As is well known, there was bankruptcy legislation in 1830, when the Act of 6 Geo. 4 was passed, in 1849 again, and in 1869. In those three Acts—sect. 62 of the first, sect. 140 of the second, and sect. 103 of the third—there are provisions contained which are substantially the same; but none of them, though they have been referred to in the argument, apply to the case that I have to

(1) 6th Ed. p. 749.

decide—in other words, they did not embody the substance of Lord *Loughborough's* Order. Then under the Act of 1869 the Lord Chancellor, with the advice of the Chief Judge, had power to make rules (see sect. 78): the effect of such rules when made was equivalent to an Act of Parliament. The 76th rule made in virtue of that section in 1870, practically repeated Lord *Loughborough's* Order. Now it appears to me to be a reasonable conclusion, and a right conclusion, to say that the framers of the rules did not intend to alter the construction of the Order itself. In other words, by placing among their statutory rules a rule to the same effect (viz., the 76th) as Lord *Loughborough's* Order, they intended, not to alter the law on the subject, but to embody it as it stood. Therefore, when the Legislature passed in the Act of 1883 the 40th section, it seems reasonable and proper to infer, and to adopt the inference as correct, that the Legislature, though now for the first time it put the substance of the Order on the statute book, intended the law to stand, on the construction of the section, in the same way that it stood previously to the passing of the Act.

I referred yesterday to the Lord Chancellor's observations in *Bank of England* v. *Vagliano* (1) with reference to the *Bills of Exchange Act*. Those observations do not in my opinion apply to the *Bankruptcy Act* of 1883. The substance of what fell from the Lord Chancellor is, that where there is an Act such as the *Bills of Exchange Act* codifying the law, the proper rule of interpretation is to read the Act and to interpret its provisions without reference to previous decisions or to previous legislation, that being a *primâ facie* rule only to which there would be reasonable exceptions. As the Lord Chancellor said (2): "I am of course far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code." Then he gives some examples, which I need not cite at length. But I have here to deal, not with an Act of Parliament codifying the law, but with an Act to amend and to consolidate the law, and therefore it is I say those observations do not apply, and I think it is legitimate in the interpretation of the sections in this amending and

(1) [1891] A. C. 144. (2) [1891] A. C. 145.

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consolidating Act to refer to the previous state of the law for the purpose of ascertaining the intention of the Legislature.

Now, I have said there is a course of authority upon the subject previous to the Act of 1883. I mention merely among the later authorities *Ex parte Kennedy* in 1852 (1), which was before the Lords Justices *Knight Bruce* and *Turner*, where it appears that the Lords Justices adopted the proposition that a joint creditor would be entitled to prove in competition with separate creditors against the separate estate if there was no joint estate. I say that, not by reason of any actual statement of the law to that effect by the Lord Justice *Knight Bruce*, but from reading the report as it stands, Lord Justice *Knight Bruce* referring to the unreported case of *Ex parte Clay* (2); but in the result the Court held that this rule or exception (whichever I ought to call it) did not apply, because there was joint estate, though of very trifling amount. Another case that I mention among the more recent ones is *Lodge* v. *Prichard* (3), where Lord Justice *Turner* again refers to this rule or exception, whichever it ought to be called: "It was said, however, on the part of the appellant that in the cases above referred to there was joint estate remaining to be administered, and the further rule in bankruptcy, that joint creditors may prove against the separate estate when there is no joint estate, and no solvent partner, was relied upon in support of the appeal, and contended to be applicable in this case." The Court held that the rule did not apply to the case before it; but Lord Justice *Turner*, whose accuracy and carefulness are well known, adopts the rule in the passage which I have just stated.

Now, there has been one decision since the Act of 1883 on this point, that is the decision of Mr. Justice *Cave* in *In re Carpenter* (4). One of the partners in that case had not been adjudicated a bankrupt, but he was insolvent and signed a declaration of insolvency, and the Official Receiver was satisfied that he could pay nothing. Mr. Justive *Cave* decided the case on the footing, according to the admissions properly made, that the non-bankrupt partner had been adjudicated a bankrupt; and then he

(1) 2 D. M. & G. 228.
(2) 6 Ves. 813.
(3) 1 D. J. & S. 615.
(4) 7 Morrell, 270.

decided that the joint creditor was entitled to rank for dividends against the separate estate of *Carpenter*, the actual bankrupt, in competition with the separate creditors of *Carpenter*. Now it has been very properly observed that in that case Mr. Justice *Cave* had not presented to him the elaborate argument that I have heard, and in making the order Mr. Justice *Cave* does not deal elaborately with the question; but he had sect. 40, sub-sect. 3, before him, and he made the order; and it appears to me that this is a decision in point, and one which I ought not to dissent from unless I can find plain reasons for thinking it wrong. So far from finding reasons for thinking it wrong, I express my own opinion, after the excellent argument that has been delivered on both sides, that the decision is right, and the consequence is that I follow it.

The result, therefore, on the whole is, that Mr. *Adams* is, in respect of the joint debt of the two, entitled to draw dividends in competition with the separate creditors of each of the two partners of the old firm, and my order will be accordingly.

Solicitors: *Ingle, Cooper, & Holmes; Simpson & Cullingford.*

W. C. D.

NORTH, J.
1894
May 9, 10

HAMBRO *v.* HAMBRO.

[1894 H. 462]

Rent-charge—Arrears—Jurisdiction to Sell.

There is equitable jurisdiction to order a sale or mortgage of land to raise arrears of a jointure rent-charge issuing out of the rents and profits of the land; though there is no express charge on the land; but the exercise of the jurisdiction is discretionary.

THIS was an originating summons to determine whether arrears of a jointure rent-charge could be raised by sale or mortgage of the *corpus* of the land out of the rents and profits of which the jointure issued.

By a settlement dated the 3rd of April, 1861, made in contemplation of the marriage which was solemnized between *Charles J. Baron Hambro* and *Eliza Frances Greathed* (the Plaintiff to the summons), certain hereditaments described in a schedule to the deed were conveyed "to the use of the said *Charles J. Baron Hambro* and his assigns for and during the term of his natural life and from and after his decease (in case he shall die in the lifetime of the said *Eliza Frances Greathed*) to the use intent and purpose that the said *Eliza Frances Greathed* and her assigns shall and may yearly and every year during her natural life have receive and take by and out of the rents and profits of the said messuages farms lands tenements hereditaments and premises one clear yearly rent-charge or sum of £3000 of lawful money of *Great Britain* such rent-charge or sum of £3000 to be free and clear of and from all taxes charges and deductions whatsoever now or hereafter to be taxed charged or imposed upon the same messuages farms lands tenements hereditaments and premises or any of them or (except for property or income tax) upon the said yearly rent-charge of £3000 or upon the said *Eliza Frances Greathed* or her assigns in respect thereof the yearly rent-charge or sum of £3000 to be in full for her jointure and in lieu bar and full satisfaction of and for her dower and thirds at common law or by custom freebench or widows part which she can shall or may

or otherwise might have or claim of in to or out of all and every or any of the freehold copyhold or customary lands tenements and hereditaments whereof or whereto the said *Charles J. Baron Hambro* at any time during the said intended coverture shall be seized or entitled for any estate of inheritance of freehold or copyhold tenure or to which dower or freebench is incident and to be paid and payable to her the said *Eliza Frances Greathed* or her assgins by equal quarterly payments on the 25th day of March the 24th day of June the 29th day of September and the 25th day of December in every year the first payment thereof to be made on such of the same days as shall first happen after the decease of the said *Charles J. Baron Hambro* with full powers (in case of non-payment for twenty-one days) of entry and perception of rents and profits and distress and of re-entry and perception of rents and profits and distress (from time to time) to secure payment of the said rent-charge and all arrears thereof and all costs and expenses occasioned by the non-payment thereof." A term was created by the settlement to provide for portions of the children of the marriage; but there was no express provision in the settlement by means of a term or otherwise to secure the rent-charge or arrears thereof on the *corpus* of the settled land. After creating the term "From and after the end, expiration, or other sooner determination of the said term of 1000 years, and in the meantime subject thereto and charged and chargeable as aforesaid," uses were declared.

Baron Hambro died in November, 1877. There was no issue of the marriage. The settled land was now vested in fee, subject to the jointure, in *Charles Thomas Hambro*, the Defendant to the summons, a grandson of *Baron Hambro* through his first wife. The rents of the settled lands had become insufficient to provide for the whole of the jointure rent-charge of £3000 a year. The jointure had been paid down to the 29th of September, 1893.

The summons asked for a declaration that the jointure and any arrears thereof were under the settlement charged on the *corpus*, as well as the rents and profits of the lands described in the schedule thereto; or, alternatively, that the jointure and arrears constituted a continuing charge on the rents and profits;

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for a declaration that the Plaintiff was entitled to possession of the settlement; that the arrears of the jointure with interest might be raised by a sale or mortgage of a competent part of the land, and paid to the Plaintiff; and for a receiver of the rents and profits, and costs.

It was admitted on behalf of the Defendant that all unpaid arrears were a continuing charge on future income.

Swinfen Eady, Q.C., and *C. E. E. Jenkins*, for the Plaintiff:—

The Court has an equitable jurisdiction to direct a sale of land out of the rents and profits of which an annuity is payable, though there is no charge on the land in terms. It may be there are circumstances in any particular case, such as the existence of a settlement, to induce the Court not to exercise its jurisdiction. But in this case the land out of which the jointure issues belongs to one person in fee, and there is no other special reason why a sale should not be ordered: *In re Tucker* (1); *Cupit* v. *Jackson* (2); *Hall* v. *Hurt* (3); *Taylor* v. *Taylor* (4); *Horton* v. *Hall* (5); *Phillips* v. *Gutteridge* (6).

On the construction of the whole settlement, there is here a charge on the *corpus* of the settled property to secure the jointure: *Birch* v. *Sherratt* (7).

Cozens-Hardy, Q.C., and *J. G. Wood*, for the Defendant:—

In the settlement under consideration there is no provision by means of a term or otherwise for raising the jointure out of the *corpus*. Where there is a legal rent-charge limited by way of uses, unless there is an express charge on the land out of which the rent-charge issues, the Court will not raise arrears by means of a sale or mortgage of the land. The annuitant, besides his remedy by entry and distress and his right to have a receiver, can bring an action for debt against the *terre* tenant: *Thomas* v. *Sylvester* (8); *Ex parte Graham* (9); *Searle* v. *Cooke* (10). These are his only remedies. With the exception of *Hall* v. *Hurt*,

(1) [1893] 2 Ch. 323.
(2) 13 Price, 721.
(3) 2 J. & H. 76.
(4) Law Rep. 17 Eq. 324.
(5) Ibid. 437.
(6) 3 D. J. & S. 332.
(7) Law Rep. 2 Ch. 644.
(8) Ibid. 8 Q. B. 368.
(9) 42 Ch. D. 343.
(10) 43 Ch. D. 519.

in every case where a sale has been ordered to raise arrears of a terminable rent-charge, there has been either an express charge on the land sold, or words in the instrument creating the rent-charge which the Court has held amounted to a charge on the *corpus*: *In re Tucker* (1); *Cupit* v. *Jackson* (2); *Graves* v. *Hicks* (3); *White* v. *James* (4); *Hall* v. *Hurt* (5); *Phillips* v. *Gutteridge* (6); *Taylor* v. *Taylor* (7); *Horton* v. *Hall* (8); *Scottish Widows' Fund* v. *Craig* (9); *Bailey* v. *Badham* (10).

Swinfen Eady, in reply.

NORTH, J.:—

The first question asked here is whether this jointure is a charge on the *corpus* as well as the income, and that I do not propose to decide, because it does not seem to me to be necessary for deciding the real point, which is, whether there is a right to have a sale of the estate for the purpose of raising the arrears of the annuity. The cases shew that where a jointure rent-charge falls into arrear, and cannot be recovered by the exercise of the powers of distress and entry, the Court has power to raise the arrears by a sale or mortgage of the capital of the estate. It is clear, also, that although there is jurisdiction to do it, it does not follow, as a matter of course, that it will do it immediately after a small amount falls into arrear. I do not think the time has come when I can order any such sale at present; but, dealing with the question of whether the Court has power to order a sale, I think it has.

It was said that, in all the cases referred to, except in *Hall* v. *Hurt*, the *corpus* of the property, as distinguished from annual income, is charged with rent-charge. I do not think that is a correct criticism upon the decisions.

In *Cupit* v. *Jackson* I see no reason for saying that there the property was charged in the sense which I have just mentioned. The property was conveyed to the use that the settlor

(1) [1893] 2 Ch. 323.
(2) 13 Price, 721.
(3) 11 Sim. 536, 551.
(4) 26 Beav. 191.
(5) 2 J. & H. 76.
(6) 3 D. J. & S. 332.
(7) Law Rep. 17 Eq. 324.
(8) Ibid. 437.
(9) 20 Ch. D. 208.
(10) 30 Ch. D. 84.

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should himself receive thereout an annuity for life of £45, and that his widow should receive another of £30: with general powers of distress and entry, and to the further use that *T. Brailsford* should receive and take by and out of the messuage the annuity or yearly rent or sum of £60, with like powers for recovering the same by distress and entry. That is simply an annuity or rent-charge issuing out of the property. The Lord Chief Baron says that what they had to deal with was a rent-charge. He speaks of the statutory remedy that a person who has the rent-charge has, and says (1): "I do not know that the plaintiff may not avail herself of those remedies; but the effect of either might be very uncertain." It was not necessary to limit the owner of the rent-charge to such remedies as those; but an additional remedy could be given by the Court. The reason given is this: "I think therefore this bill is sustainable notwithstanding that objection, and that her having the possibility of a remedy at law is not of itself an answer to it. The remedy in equity is more convenient and effectual than the legal remedy. It is, in many respects, a better and a safer remedy. The annuity being a charge and an incumbrance on a real estate itself, and not merely a demand against the owner of the estate" (that is the contrast, between a charge on the estate and a demand against the owner), "I apprehend the Court might, if necessary, raise the arrears out of the estate by sale or mortgage; and, in practice, that is a sufficient equitable ground of application to a Court of Equity for relief, because it is out of the power of a Court of Law."

In *Graves* v. *Hicks* (2) no doubt the yearly rent-charges were charges on the residuary estate, not confined, as I gather, to real estate; but they had been declared to be by the order on further consideration a charge on residuary real estate. In that case the Vice-Chancellor declined to order the realization of the arrears by a sale of property. But he dealt with it upon a separate ground altogether, namely, that although there was clear jurisdiction to direct a sale the Court had a discretion not to do it if it did not think fit to do so, and the fact that the property was settled would be a reason for not doing it.

(1) 13 Price, 732. (2) 11 Sim. 536, 551.

Then in *White* v. *James* (1) there seem to have been ordinary legal rent-charges, and, I think, nothing else. By an indenture of the 30th of January, 1845, *Robert Smale*, in consideration of £50 granted to the plaintiff for ever a rent-charge of forty shillings issuing out of a piece of land and six cottages, and this was followed by a covenant that, if it should be in arrear for forty-one days the grantee might enter and distrain and sell the distresses in like manner as distresses reserved by lease or common demise, and that if in arrear six months the grantee might enter and hold for his own use until the arrears should be paid. He also covenanted for title, and that the hereditaments should for ever remain charged with the rent-charge free from all incumbrances except those in the schedule. There were twenty other similar rent-charges granted out of the same property at the same time. I am not satisfied that the meaning of that covenant is that the rent-charges were charges on the *corpus* of the property, but that they were legal charges issuing out of the property, and that being so, the decision of Sir *Samuel Romilly* is quite in point. I do not find any case in which that has been decided that any distinction is drawn or any reliance placed upon the fact that the annuity is a charge on the *corpus*. It is obvious that Lord *Hatherley* in *Hall* v. *Hurt* (2) understood it as I do: it did not occur to him that there was any difference between *White* v. *James* and *Hall* v. *Hurt*. It seems to be perfectly clear, and it was admitted, that the latter is a case where there was a clear rent-charge only; and that is not distinguishable from the present case.

Then we come to *Taylor* v. *Taylor* (3), and I must say that case is not very satisfactory. It is very shortly reported in the LAW REPORTS, and more fully in the *Weekly Reporter*. The great difficulty in it arises from this, that the ground of the decision is put by the Vice-Chancellor himself, ten days later, in *Horton* v. *Hall* (4), as having been different from that on which it appears by the report to have been put. In that case the property was settled; as was the property in *Graves* v. *Hicks* (5). The report

(1) 26 Beav. 191.
(2) 2 J. & H. 76.
(3) Law Rep. 17 Eq. 324.
(4) Ibid. 437.
(5) 11 Sim. 551.

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does not shew that the Vice-Chancellor placed much reliance on that; but the report of the later case does represent him as saying that it was on that he went, and it was that very thing which caused the distinction between his decision in *Taylor* v. *Taylor* (1) and his decision in the later case of *Horton* v. *Hall* (2). In *Horton* v. *Hall* it was a legal rent-charge, and nothing else. The case of *White* v. *James* (3), which was apparently not called to the attention of the Vice-Chancellor in *Taylor* v. *Taylor*, having been called to his attention in *Horton* v. *Hall*, he then says: "In a recent case before me—*Taylor* v. *Taylor*—*Cupit* v. *Jackson* (4) was referred to, and I declined to apply it, because in *Taylor* v. *Taylor* the land charged with the annuities or yearly payments was in strict settlement;"—that is to say, if it had not been for that he would have applied it—"but that is not so with the land in this case, and therefore, and having regard to the case of *White* v. *James*, I shall follow *Cupit* v. *Jackson*, and make the order asked for." Therefore, those two cases taken together, taking the first as explained in the second, are very clear, and shew that the Vice-Chancellor declined to direct the sale where the property was subject to a succession of trusts or limitations; he did direct it where the property was not so subject: as in the present case. In the report of the case in the *Weekly Reporter* it is expressed very clearly (5): "Vice-Chancellor *Hall* made the order asked for, and remarked that he should follow *Cupit* v. *Jackson*, though he had in *Taylor* v. *Taylor* refused to do so, on the ground that the land, subject to the chief rent, was there in settlement, which was not the case here." That was the ground for deciding *Horton* v. *Hall* as it was decided, and that is what the Vice-Chancellor said was his ground for having decided *Taylor* v. *Taylor* as it was decided.

In the case of *Scottish Widows' Fund* v. *Craig* (6) no doubt the rent-charge was charged on the inheritance; yet the whole of the Vice-Chancellor's reasoning is addressed to the case of its not being charged on the inheritance, because he treats it as an ordinary case. He refers to the charge on the inheritance, and

(1) Law Rep. 17 Eq. 324.
(2) Ibid. 437.
(3) 26 Beav. 191.
(4) 13 Price, 721.
(5) 22 W. R. 391.
(6) 20 Ch. D. 208, 214.

he says: "It may be said, no doubt, that the object of making the charge on the inheritance was not to give any remedy beyond those specially provided by the statute, but only to bind those entitled in remainder, or the successors of the incumbent of the living: I must, however, take the facts as I find them, and if this be a rent-charge which would ordinarily be raisable by the Court out of the inheritance, by resorting to it in the mode usually adopted—by means of a sale or a mortgage of it—if that be the character of the charge, I do not see that I should be justified in holding that there is anything in these statutes that deprives the plaintiffs, the owners of the rent-charge, of the ordinary remedies." That is to say, he refers to an argument shewing that the charge on the inheritance did not help the parties, and then he proceeds to point out that it is unnecessary to go into that; that it does not matter if it does not help them, because the ordinary rights of persons in this position are such as will give them all that they are asking for. Then he goes on dealing with the case as one in which a rent-charge is ordinarily raisable out of the inheritance by sale or mortgage, and then he says: "It seems to me that, quite independently of any special provision in the statutes which have been referred to"—What is that provision? It is a provision giving a charge on the inheritance, and he throws that overboard for the reason he gives in deciding in favour of the sale. "It seems to me that, quite independently of any special provision in the statutes which have been referred to, the plaintiffs, the owners of the rent-charge, are entitled, on ordinary principles, to claim the assistance of the Court for the purpose of raising the charge, and I am not aware of any authority which states that because there are powers of distress and entry upon the property belonging to an ecclesiastical corporation, and because the payments which are to be made in respect of the rent-charge are not to be perpetual, but will be determined in a certain time, the owner of the rent-charge shall not be entitled to the ordinary remedies of having it raised by a sale or mortgage." Then he refers to *White* v. *James* (1), *Cupit* v. *Jackson* (2), *Graves* v. *Hicks* (3), and *Hall* v. *Hurt* (4).

(1) 26 Beav. 191.
(2) 13 Price, 721.
(3) 11 Sim. 536, 551.
(4) 2 J. & H. 76.

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He does not refer to either of his two previous decisions. I take it at this time he was laying down in clear terms what are the ordinary rights (independently of any special statutory provision) of a person entitled to a legal rent-charge which has fallen into arrear.

Then the later case, *Bailey* v. *Badham* (1), before Vice-Chancellor *Bacon*, does not help one much. I think that he dealt with the case as being something that was not a rent-charge, although in the nature of a rent-charge. A charge in lieu of tithes in respect of which only two years could be recovered was not an ordinary rent-charge; and therefore that case does not throw any light upon the cases on which I have just commented, or affect what I consider to be the legitimate conclusion from those cases.

In *In re Tucker* (2), there was an additional ingredient, that the *corpus* clearly was charged with the annuities—annuities which very likely were rent-charges, but were not the less annuities. No one disputes that in that case there could be a sale.

I do not think that this is a case where there should be any sale at present. All I can do is to say: The Court being of opinion that there is jurisdiction to order the raising by sale or mortgage of the arrears of the rent-charge, but that there is no ground at present for exercising the jurisdiction, I direct the summons to stand over with liberty to apply.

Solicitors for the Plaintiff: *Preston, Stow, & Preston,* agents for *Rooke & Coker, Bath.*

Solicitors for the Defendant: *Hawes, Wood, & Ware.*

(1) 30 Ch. D. 84. (2) [1893] 2 Ch. 323.

D P.

NORTH, J.
1894
May 24, 25.

In re SHAW.
ROBINSON *v.* SHAW.

[1894 S. 99.]

Settlement—Illegitimate Child en Ventre sa Mère.

A. and *B.*, his aunt by the half-blood, went through the ceremony of marriage; a settlement was afterwards made providing for the children of *B.* by *A.*; a month afterwards a child was born of *B.* by *A.*:—

Held, that the child took no benefit under the settlement.

IN the year 1843, *William Shaw* and *Emma Bentley*, his aunt by the half-blood, went through the form of marriage. By a settlement dated April, 1844, expressed to be made between *William Shaw* and *Emma* his wife of the one part, and certain trustees of the other part, the trusts of a sum of £15,000 in the hands of the trustees were declared subject to the life interests of *Emma Shaw* and *William Shaw* as follows:—

"Upon trust for the child children or grandchildren or other issue or all or any one or more of the children or other issue of the said marriage of the said *William Shaw* and *Emma* his wife (such issue to be born during the lives of the said *William Shaw* and *Emma* his wife or the life of the survivor of them) in such manner and form and if more than one in such parts shares and proportions and with such limitations over or substitutions in favour of any one or more of the others of such children, grandchildren and issue respectively and to vest and be payable and paid transferred and assigned at such time or times age or ages and upon such contingencies and under and subject to such directions and regulations for maintenance education and advancement and such conditions and restrictions as the said *Emma Shaw* at any time or times and from time to time during her life by any deed or deeds instrument or instruments in writing to be sealed and delivered by her in the presence of and attested by two or more credible witnesses with or without power of revocation and new appointment such new appointment to be in favour of some one or more of the objects of this present

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provision, or by her last will and testament in writing or any codicil or codicil thereto to be by her respectively duly executed and attested shall direct and appoint." And in default of appointment upon trust for the child or children "of the said *Emma Shaw* by the said *William Shaw* her husband" as therein mentioned, and in case there should not be any children of the marriage for the said *Emma Shaw* in case she should survive the said *William Shaw*.

William Shaw and *Emma Bentley* lived as husband and wife till he died in July, 1880. They had had ten children, the eldest of whom *Emmeline*, now the wife of the Rev. *T. A. A. Hughes*, was born on the 3rd of May, 1844. *Emma Bentley* died in May, 1892, having made a will by which she devised and bequeathed the residue of her real and personal estate (and she thereby exercised any power of appointment she might have under the settlement made after her marriage with her late husband *William Shaw*) to trustees upon trust to sell, and out of the proceeds to pay her funeral and testamentary expenses, debts and legacies, and upon trust to invest the residue and hold the investments upon trust for her children *Herbert William Shaw, Maurice Edgar Shaw, Emmeline Hughes, Mary Louisa Shaw, Agnes Bentley Butler, Beatrice Emma Shaw*, and her grandchild *Bertie Walter Butler*, in equal shares.

This was an originating summons to determine who was beneficially entitled to the trust funds comprised in the above-mentioned settlement.

The Plaintiffs were the trustees of the settlement, the Defendants were the trustees of the will of *Emma Bentley*, Mrs. *Hughes* and the surviving children and grandchild of the testatrix.

Strickland, for the Plaintiffs.

Vernon R. Smith, for *Emmeline Hughes*:—

It is lawful to provide for an illegitimate child who has been begotten, by an instrument made before the child is born. In this case the settlement, combined with the conduct of the parties, indicates that the first child, *Emmeline*, was a person intended to be provided for; as the other children can take

nothing, she takes the whole fund: *Occleston* v. *Fullalove* (1); *Pratt* v. *Mathew* (2).

In re Bolton (3) does not apply, for the will there before the Court was made before the child claiming was begotten, and the testator died before the child was born.

H. Fellows, and *Christopher James*, for other Defendants, *contrà*, were not called on.

NORTH, J.:—

In my opinion this child does not take. It is rather a fortunate circumstance for the family, for, if one child were to take the whole, the intention of the parties would be defeated.

The facts are shortly these. The ceremony of marriage was gone through between *William Shaw* and *Emma Bentley*, in 1843, persons so related that they could not lawfully marry or have legal issue. On the 9th of April, 1844, *William Shaw* joined in a settlement of £15,000 belonging to the lady he called his wife; on the 3rd of May, 1844, less than a month after the settlement was made, the first of ten children was born. *William Shaw* died in 1880; his reputed wife died in 1892. The question raised is whether the first child under the settlement takes the whole, and the others take nothing. It is conceded that according to law the rest can take nothing, for the provision made was for illegitimate children, and they were not then even begotten or thought of. No doubt it was present to the minds of the parties who executed the settlement that a child was likely to be born at an early date. The limitations in the settlement are to the effect that after the death of the survivor of *Emma Shaw* and *William Shaw* the funds are to be held upon trust for the issue "of the said marriage"—that is the phrase used—"of the said *William Shaw* and *Emma* his wife" as the wife should appoint, and in default of appointment for the children equally. That is clearly intended as a provision for illegitimate children subsequently to be born to an extent that cannot wholly take effect: it was not the intention to give the whole to the first; but it is said that

(1) Law Rep. 9 Ch. 147. (2) 22 Beav. 328.
(3) 31 Ch. D. 542.

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the legal effect was to give the whole to the first. I am of opinion that such is not the legal effect. No doubt there was a child then begotten in favour of whom a settlement might have been made if proper and apt words had been used; if the settlement had referred to a child already begotten and not born, for example, that might have been sufficient. I do not find any such words. I do not find a trace of anything indicating a reference to that child otherwise than as one of a class. It is said that "child" meant "reputed child," and that the conduct of the parents was such that this child gained the reputation of her being their legitimate child. I do not think that is enough. What we are dealing with is a deed, not a will. I do not see any ground for attributing a reputation of legitimacy to a child who could not possibly have had the reputation of being, at the date of the settlement, the child of any particular person; for all the Judges in *Occleston* v. *Fullalove* (1) agree that a child not born could not have the reputation of being the child of a particular person. I think, therefore, this child does not take, though the settlement might have been framed in a way to give her an interest.

Solicitors for Plaintiffs: *J. & R. Gole*, agents for *Oxley & Coward, Rotherham.*

Solicitors for Defendants: *Stibbard, Gibson & Co.*, agents for *C. H. Booth, Ashton-under-Lyne.*

(1) Law Rep. 9 Ch. 147.

D. P.

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1894
May 30.

In re WOOD.
ANDERSON *v.* LONDON CITY MISSION.

[1894 W. 605.]

Order in Lunacy—Ademption of Legacy.

The transfer, under an Order in Lunacy, of 2¾ per cent. Consols into the name of the Paymaster-General out of the name of a testatrix who had become of unsound mind:—

Held, not to adeem a bequest by the testatrix of all 2¾ per cent. Consols "standing in my name and belonging to me at the time of my decease."

The investment, under the same order, of money of the testatrix in like Consols in the name of the Paymaster-General, *held*, not to increase the legacy.

Part of the Consols in Court were subsequently sold, under the same order, to raise costs. The Court now directed that the sale should be taken in reduction, not of the amount transferred, but of the amount invested so as to preserve the rights of the legatees.

By her will, dated the 21st of May, 1890, the testatrix, *Elizabeth Sharpe Wood*, gave and bequeathed "All moneys standing in my name and belonging to me in the New 3 per cent. Consolidated Bank Annuities in the *Bank of England* at the date of my decease unto and equally to be divided between" two charities, the *London City Mission* and the *Richmond Hospital*.

By a codicil to her will, dated the 5th of September, 1890, the said testatrix corrected an error contained in her will as to the name of the stock belonging to her in the *Bank of England*, and stated that the same should have been described as £2 15*s*. per cent. Consolidated Stock, and directed "that the bequests directed by my said will to be paid out of the New 3 per Cent. Consolidated Bank Annuities shall be paid out of any money standing in my name in the books at the *Bank of England*, or out of money in my house, or belonging or due to me at my decease." And after making other bequests by the codicil, she in all other respects ratified and confirmed her said will.

On the 1st of July, 1892, it was proved to the satisfaction of the judicial authority in Lunacy, that the said *E. S. Wood*

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was, through mental infirmity, arising from disease or old age, incapable of managing her affairs, and an order was made for the disposition of her property.

At the date of the will and codicil there was standing the sum of £100 New Consols in the books of the *Bank of England*, in the name of the deceased, in a survivorship account, the title of the account being "*Ann Wood* (deced.), *Mary Ann Wood* (deced.), and *Elizabeth Sharpe Wood*." Under the Order in Lunacy of the 1st of July, 1892, this sum of £100 New Consols was transferred into the name of the Paymaster-General, and after such transfer other moneys, about £1250, belonging to the testatrix were invested in the name of the Paymaster-General in New Consols; and after such transfer and investment, and in further pursuance of the Order in Lunacy of the 1st of July, 1892, a sum of £94 14*s.* 9*d.* was raised by a sale of less than £100 of Consols, and paid away in satisfaction of costs.

The testatrix died on the 20th of November, 1893. At the time of her death the sum of £1315 11*s.* 11*d.* New Consols stood in the name of the Paymaster-General to the credit of the matter in Lunacy.

This was an originating summons to which the executors and trustees of the will of *Elizabeth Sharpe Wood* were Plaintiffs, and the trustees of the *London City Mission* and the trustees of the *Royal Hospital, Richmond*, were Defendants, for the purpose of determining whether any and what part of the estate of the testatrix passed under the legacy to the charities.

Swinfen Eady, Q.C., and *Ribton*, for the Plaintiffs:—

At the time of the death of the testatrix there was no sum of Consols standing in her name; the transfer of the Consols under the Order in Lunacy operated as an ademption of the legacy to the charities: *In re Freer* (1); *Attorney-General* v. *Marquis of Ailesbury* (2); *Lunacy Regulation Act*, 1853, s. 119; *Lunacy Act*, 1890, s. 123.

If the transfer into Court did not effect an ademption, the subsequent sale to provide for costs did *pro tanto*, for the Consols sold will be considered to have been taken out of those first

(1) 22 Ch. D. 622. (2) 12 App. Cas. 672.

placed in the name of the Paymaster-General, by analogy to the rule in *Clayton's Case* (1).

S. Hall, Q.C., and *Warrington*, for the Defendants:—

The Consols in Court at the date of the death of the testatrix, belonging to her, were in effect standing in her name; we claim, therefore, the whole of the Consols. There is nothing in the carrying out the Order in Lunacy that necessitates an interference with the intention of the testatrix—a thing the Court will, if possible, prevent. The rule in *Clayton's Case* is inapplicable to such a case as this.

Swinfen Eady, in reply.

NORTH, J. (after holding that the combined effect of the will and codicil was to bequeath the sum of 2¾ per cent. Consols standing in the name of the testatrix at the time of her death to the two charities, with an option in her executors, instead of handing over such 2¾ per cent. Consols to the charities, to pay the value out of other specified property, proceeded):—

Having regard to what has happened since, how does this matter work out? The bequest is of annuities "standing in my name and belonging to me." At the time of making her will the testatrix had £100 in Consols; she afterwards became a lunatic. This money was transferred into the name of the Paymaster-General; it ceased to be standing in her name, though of course it continued to belong to her; other parts of her estate were realized by the committee who paid the proceeds into Court, and that was invested in a much larger sum of 2¾ per cent. Consols. But part of the Government annuities standing to the credit of the testatrix's account was paid out in satisfaction of some costs. It is said that the sum of £97 so got rid of must be taken to be an application of part of the £100, and not of the sum subsequently paid in of £1250, because of the doctrine of *Clayton's Case*. I do not think it is necessary to introduce—so far as I know for the first time—that doctrine into such a case as this, for the purpose of making the Court do unintentionally

(1) 1 Mer. 572.

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what it certainly would not have done intentionally—disappoint the intention of the testatrix expressed in her will.

The sum subsequently invested clearly would not pass; it never was money standing in the name of the testatrix in Consols, and the fact of the Court, for convenience, having directed this money to be invested in Government stocks in her name would not, as counsel contended, have the effect of swelling the legacy given by the will. But it is not necessary to decide that, because the money was not invested in the name of the testatrix; therefore, as regards the £1250, I think the Defendants cannot claim any part of that. Then, as regards the £100, are they to have the whole of it, or £2 odd of it, or none of it? I do not think the fact that it has ceased to be standing in her name, and has been placed in the name of the Paymaster-General, is in itself sufficient to take away the whole effect of the gift. Then as regards the sum applied in payment of costs, as I have pointed out, if the attention of the Court had been called to the existence of the will containing this bequest, although of course it might have been necessary to convert the Consols for the benefit of the testatrix or of the estate, the Court certainly would not have done anything, if it could have helped it, that would have had the effect of altering the disposition of her will, and the Court would have directed that money to be kept in such a state that it would remain for the benefit of the legatee, or, in other words, would have given any direction that was required for the payment of costs or other expenses or outgoings, or the maintenance of the lunatic, if necessary, out of money the payment out of which would not disappoint the legatees under the will. What the Court actually did was to direct a sale of Consols to pay costs, but there was no direction that any particular part of the Consols should be applied for that purpose. No doubt if the sale had taken place when the £100 only was in Court, there must have been a sale of part of that; but before the sale took place a further sum had been paid into Court, and therefore the direction to be carried out was a direction to sell so much of the annuities belonging to the estate of the lunatic as was necessary to raise a certain amount of costs. That was done. The Court

has never yet done anything to say out of what part of the annuities that ought to come; and I do not think that there is anything to prevent the Court saying out of what part it should come. That being so, I think the Court should now say it must be taken out of that part which will not prejudice the legatees under the will. In my opinion, therefore, they are entitled to the value of the £100 Consols, to be made good to them in such way as the executors think fit out of the estate of the testatrix.

Solicitors for the Plaintiffs: *Woodbridge & Sons*, agents for *Senior & Lambert, Richmond, Surrey.*

Solicitors for Defendants: *Jenkinson, Owen & Co.*

D. P.

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May 31.

[1892 S. 1847.]

Patent—"Threats"—Injunction—Inquiry as to Damages—Loss of Contract—Evidence—Admissibility—Measure of Damage—Patents, Designs, and Trade Marks Act, 1883 (46 *&* 47 *Vict. c.* 57), *s.* 32.

In an action under sect. 32 of the *Patents, Designs, and Trade Marks Act*, 1883, an injunction was granted restraining the Defendant from threatening the Plaintiff with legal proceedings or liability in respect of the manufacture or use of cameras, made pursuant to an invention of the Plaintiff, but alleged by the Defendant to be an infringement of a patent belonging to him. And an inquiry was directed whether the Plaintiff had sustained any, and what, damages by reason of the Defendant's threats. Upon the inquiry the Plaintiff alleged that he had, by reason of the Defendant's threats, lost the benefit of a contract which he was on the point of concluding with a company for the exclusive use by them of his camera, at a specified price for each camera, for a term of three years, the company guaranteeing orders to a minimum amount of £750 per annum during the term:—

Held, that a letter, written by the company's solicitors to the Plaintiff, stating that the company declined to continue the negotiations for the contract because of the Defendant's threats, was admissible (though not necessarily conclusive) evidence that the negotiations were in fact discontinued because of the Defendant's threats:

Held, also, that the proper measure of the damages was the profit which the Plaintiff would have derived from the proposed contract, if it had been carried out.

SUMMONS by the Defendant to vary the Chief Clerk's certificate as to the amount of damages payable by the Defendant to

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the Plaintiff, under an inquiry as to damages directed by the judgment at the trial of the action.

The action was brought on the 16th of May, 1892, under sect. 32 of the *Patents, Designs, and Trade Marks Act*, 1883, claiming an injunction to restrain the Defendant from threatening the Plaintiff with legal proceedings in respect of an alleged infringement of a patent belonging to the Defendant. The Defendant traded as *Shew & Co.* The Plaintiff, who carried on business as *J. H. Skinner & Co.*, was a manufacturer of photographic materials. In November, 1891, he entered into negotiations with the *London Stereoscopic Company* as to the supply to them of a photographic camera which the Plaintiff manufactured, and for which he had, on the 20th of November, applied for a patent, and had filed a provisional specification. On the 24th of November, 1891, the Plaintiff had an interview with Mr. *Butler Humphreys*, the manager of one of the company's shops, on the subject. The Plaintiff then quoted the prices at which he was prepared to supply the camera in four different sizes, the company to have the sole right of selling the camera. At the same time the Plaintiff undertook to maintain his patent at his own expense, and to indemnify the company against any legal proceedings which might arise in respect of it.

On the 27th of November, 1891, the Plaintiff received a letter from Mr. *Humphreys*, on behalf of the company, as follows:—

"I have had a conversation with the management respecting your patent camera, and the proposition that we have to make to you . . . . is practically as follows: We are to guarantee to take from you not less than £500 worth of the patent camera, dark slides, and appurtenances, per annum, and that, as long as we continue to do this, the sole right of the wholesale and retail trade is to be ours. The first order that we propose to give you is for a gross of cameras of the various sizes, to be delivered as wanted. We shall sell the cameras as our own patent, but of course each one will be stamped by you with the number of your patent. The amount that we have stated is, in our opinion, likely to be exceeded very largely, especially after the first year, and you can quite understand that it will not pay us to push and advertise the camera unless such is the case. As also explained

at our interview, you undertake to exonerate us from any costs in connection with the maintenance of the patent, as also all legal costs, should it be contested."

On the 30th of November the Plaintiff had another interview with Mr. *Humphreys*, at which Mr. *Mitchell*, the general manager of the company, was also present. At this interview it was agreed that the Plaintiff should supply the company with his camera, at the prices which he had previously quoted, and that the company would guarantee orders up to £750, as a minimum per year, for three years, with the option of their continuing sole licensees after that term, provided that the minimum annual order remained at £750. The Plaintiff was further to supply all extras, except lenses, which the company required. The first order was to be for one gross of cameras, with six backs to each, all to be taken within the first year, and the guarantee was to run from the date of the delivery of the first fifty cameras. Mr. *Humphreys* promised to draft an agreement embodying the terms, and to send it to the Plaintiff for approval. Some delay took place, and further letters passed; and on the 20th of December, 1891, Mr. *Mitchell* wrote to the Plaintiff:—

"I hope to write you shortly with draft agreement. . . . The matter is quite settled as far as we are concerned, and only wants formal ratification."

On the 11th of January, 1892, Mr. *Humphreys*, on behalf of the company, wrote to the Plaintiff as follows:—

"Mr. *Mitchell* has the order for the cameras already written out to send down to you, and has, I believe, the agreement just about ready. In looking at your camera and thinking it over very carefully, and on comparing it with *Shew's*, I have been very much struck with the similarity, that is, the way in which it is brought out to focus. Now, of course, we shall all be very loth to get into any legal trouble, and the purport of my present letter is, to ask whether you have taken any patent agent's opinion upon the validity of your patent; and, if so, could you send me a copy of same. If you have not already done so, don't you think that for our mutual advantage it would be as well to get the opinion at once? Of course, this means a certain

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amount of expense, and it would be only reasonable, if the patent agent's report was in favour of yourself, that we should pay the expense, but, if the reverse, you would, I am sure, not object to pay it. Please do not for one moment think that I am raising any difficulty respecting the agreement, but am only anxious that neither of us should get into any legal difficulties."

On the 15th of January, 1892, the Plaintiff wrote to the company a letter, in which he said, "We are not afraid of *Shew's* for two reasons," which he stated.

On the 26th of January, 1892, Mr. *Mitchell*, on behalf of the company, wrote to the Plaintiff as follows: "I have sent the camera" (one which the Plaintiff had sent to the company) "along with one of *Shew's*, and their specification, to our own agent and at our expense, in order to obtain an outside opinion, which I trust you will approve of. I am only too anxious to get to work with it, but at the same time we detest litigation, and have no wish for any legal questions as to infringements, designs, &c., to crop up after we have entered on the contract. We are promised reply by Monday next; after that I hope there will be little delay, and that the report will be favourable."

On the 1st of February, 1892, Mr. *Mitchell*, on behalf of the company, wrote to the Plaintiff as follows:—

"Enclosed please find a copy of the patent agent's opinion respecting the validity of the new patent camera. The firm from whom we have obtained the same may almost be considered, not only as patent agents, but patent lawyers, so that you may thoroughly depend upon what they state as being absolutely correct. Considering their adverse opinion, we regret exceedingly that you did not take similar steps before offering the camera. Of course, such an opinion renders it quite impossible for us to take the camera up. We are the more sorry for this, in that we believe we could have done a very good business with it; but, of course, it is very much better to have this understanding at the beginning than for you to have made a big stock, and for us to have stocked them, and have them thrown on our hands to our mutual disadvantage. Under no circum-

stances would our directors touch an invention likely to be infringing an existing patent."

The report of the patent agents, which was inclosed in this letter, stated that in their opinion the Plaintiff's camera was an infringement of the Defendant's patent, and that the Defendant would succeed in an action for infringement against the Plaintiff.

On the 3rd of February, 1892, the Plaintiff wrote to the company: "Yours to hand with patent agents' report. This does not in the slightest degree cause us to doubt the validity of our patent. . . . We quite understand your objection to having any difficulty. At the same time, we undertook to defend any action, and on this understanding you agreed to take camera. You weeks ago ordered us to proceed, and consider the matter settled. We have gone to considerable expense already. Besides, the season is now on us, and it is too late to make fresh arrangements; we, therefore, must hold you to your agreement, and cannot consider it as cancelled."

On the 5th of February, 1892, Mr. *Humphreys* wrote on behalf of the company to the Plaintiff, proposing that he should come up to *London* for a personal interview.

On the 6th of February, 1892, the Plaintiff replied that he could not come to *London* then, and added: "We are exceedingly surprised at your line of action. You will remember you stipulated that a clause should be inserted in the agreement that we should have to defend any action against our patent, and at our cost. This we agreed to do. We never said it was unassailable; any person can assail a patent. We maintain that it is perfectly clear of *Shew's* patent, and we are exceedingly surprised that, after sending the letter which we have received stating that 'under no pretext whatever should you deviate from the verbal agreement, &c., that we might consider it settled, and instructing us to secure men, make all arrangements, &c.,' now, on the pretext that *Shew* might attempt to upset it, you throw it over. You cannot for one moment suppose that we should submit to this, nor can we see what good can be done by a personal interview while you take such ground. We should be very sorry for this matter to cause any unpleasantness, but you must admit that we have every reason to complain."

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A draft agreement between the Plaintiff and the company, embodying the terms which had been agreed upon as above, was prepared by the company's solicitors between the 10th and 15th of February.

On the 12th of February, 1892, Mr. *Humphreys*, on behalf of the company, sent to the Defendant one of the Plaintiff's cameras, with a letter in which he said: "We have had submitted to us, with a view to placing it upon the market, a folding hand camera, which we send herewith. On looking it carefully over, it struck us that in some points there were faint resemblances to your own '*Eclipse*' camera, and, as it would be quite contrary to our desire to in any way infringe upon your patent, we thought it would be very much better to submit it to you, and ask whether you thought it in any way encroaches upon your rights; not that we think it does, but, of course, we are always anxious to act honourably towards any other dealer in the trade."

To this letter the Defendant, on the 13th of February, 1892, replied as follows: "We thank you for your kind letter of yesterday, and in reply beg to say that the camera shewn is undoubtedly, in our opinion, an imitation of ours and an infringement."

On the 18th of February, 1892, the Defendant wrote again to the company: "We beg to confirm our opinion previously expressed that the camera in question is an infringement of our patent. We have taken further advice in the matter, and are prepared to stop the sale of the camera, if placed on the market. If you are willing to do so, it would save time and trouble if you would give us the name of the manufacturer, and we will communicate direct with him."

On the 19th of February, 1892, Messrs. *Collette & Collette*, the solicitors of the company, wrote to the Plaintiff, telling him that they had been consulted by the company, and had seen the correspondence between the Defendant and the company, and that the company had submitted the Plaintiff's camera to the Defendant in order to ascertain whether the Defendant considered the Plaintiff's camera an infringement of his own. The letter proceeded: "The result is that they (the company) have received from Messrs. *Shew & Co.* a letter (that of the

18th of February, 1892) of which we send you a copy. Under these circumstances it is absolutely impossible for our clients to continue any negotiations for an agreement. However useful your invention may be, they cannot submit themselves to the risk of a law suit. We are, therefore, instructed to inform you that our clients decline to continue the negotiations, at the same time desiring us to express their regret that both you and they should have been put to any inconvenience in the matter."

On the 20th of February, 1892, the Plaintiff wrote to the Defendant, telling him that he had heard from the company that the Defendant intended to dispute the Plaintiff's right to make his camera. The letter continued: "We may say we have taken competent advice from more than one eminent authority, and we are fully prepared to defend any action that you may bring. . . . We cannot for a moment entertain the idea of withdrawing our camera from the market. We have already a number of these in hand, and they will be in the market directly."

In reply to this the Defendant, on the 23rd of February, 1892, wrote to the Plaintiff: "We can only confirm ours of the 18th to the *London Stereoscopic Company*, that we considered the camera in question an infringement of our patent, and are prepared to take action to stop the sale."

After some further correspondence the writ in this action was served on the 16th of May, 1892. The Plaintiff gave notice of motion for an injunction, and on the hearing of this motion on the 1st of July, 1892, it appeared that the Defendant could not yet bring an action for infringement against the Plaintiff, because the Defendant had applied at the Patent Office for an amendment of the specification of his patent, and these proceedings were still pending. It was then agreed to treat the motion as the trial of the action, and Mr. Justice *North* granted a perpetual injunction "restraining the Defendant, his servants, &c., from threatening the Plaintiffs, their customers, or any other person or persons, by circulars, advertisements, or otherwise, with legal proceedings or liability in respect of the manufacture or use of cameras made pursuant to an invention of the Plaintiffs, but alleged to be an infringement of the Defendant's

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patent," and an inquiry was directed whether the Plaintiffs had sustained any and what damages by reason of the Defendant's threats. The decision was affirmed by the Court of Appeal: *Skinner & Co.* v. *Shew & Co.* (1). The inquiry as to damages was stayed, on the undertaking of the Defendant to bring an action against the Plaintiff for the infringement of his patent, so soon as his specification had been amended, and to prosecute the action with due diligence. The Defendant amended his specification, and commenced an action accordingly against the Plaintiff, but ultimately, on the 4th of May, 1893, the Defendant discontinued the action. The Plaintiff then proceeded with the inquiry as to damages. The damage alleged by the Plaintiff was the loss of the contract with the company. The evidence before the Chief Clerk consisted of the correspondence between the parties and some affidavits.

The Plaintiff was cross-examined on his affidavits, and *Mitchell*, *Humphreys*, and Mr. *G. E. Collette*, one of the firm of *Collette & Collette*, were examined.

In the course of his examination the Plaintiff said: "The subject-matter of the action is the first hand camera that I have put on the market. There is a large market for hand cameras outside the *London Stereoscopic Company*. I have sold only one of the hand cameras of the pattern of the subject-matter of this action since February, 1892. The invention was a valuable one. I have not tried to sell more, because the action was pending. When the infringement action was stayed the season was over. I have finished about a dozen. I have not offered them to a person in the trade." None of the other witnesses was asked to state the reason why the proposed contract with the *Stereoscopic Company* was not carried out.

The Chief Clerk came to the conclusion that that contract was not carried out because of the Defendant's threats, and he awarded the Plaintiff £700 damages. There was evidence as to the cost of making the cameras, and, comparing that cost with the price which the Plaintiff would have received under the proposed contract with the company, the Chief Clerk considered that £700 was a fair estimate of the profits which the Plaintiff

(1) [1893] 1 Ch. 413.

would have derived from the contract, if it had been carried out, in the two seasons commencing respectively on the 1st of March, 1892, and the 1st of March, 1893. The Chief Clerk gave the Plaintiff no damages in respect of the third season commencing the 1st of March, 1894. He considered that the Plaintiff might have obtained in the market for the third season a profit equal to that which he would have obtained under the contract with the company.

The Defendant took out a summons to vary the certificate by disallowing the £700, on the ground that there was no evidence to support the finding of the Chief Clerk, or in the alternative to reduce the damages.

T. Terrell, for the Defendant :—

(1.) If the Plaintiff has suffered any damage at all, it did not result from any act of the Defendant.

(2.) The damage is merely nominal.

(3.) The Chief Clerk has adopted a wrong measure of the damages. He should have given only the difference between the prices which the Plaintiff would have obtained under the contract with the company and those which he would have obtained from the sale of his cameras in the market.

(1.) The Plaintiff is bound to prove affirmatively that the negotiations with the *Stereoscopic Company* were broken off by reason of the Defendant's threats. It is not sufficient to shew that they may have been broken off either by reason of those threats or for some other reason. Damages can be given only for the direct and inevitable result of the Defendant's threats: *Hadley* v. *Baxendale* (1). The earlier correspondence shews that, before any threat by the Defendant, the company considered that the Plaintiff's camera might be an infringement of the Defendant's patent. The only evidence that the company broke off the negotiations because of the Defendant's threats is the statement to that effect contained in their solicitors' letter of the 19th of February, 1892. That letter may be evidence against the Defendant of the fact that the negotiations were broken off, but it is not evidence against him that the statement of the reason was

(1) 9 Ex. 341.

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true. The company's manager ought to have been asked why he broke off the negotiations. The state of a man's mind is a question of fact: *Mansell* v. *Clements* (1). The manager was not asked that question, and the result is that there is no legal evidence of damage to the Plaintiff being caused by the Defendant's threats. The Plaintiff only claims damage for the loss of the contract with the *Stereoscopic Company.*

(2.) The damage (if any) was only nominal. It ceased when the Plaintiff obtained an injunction. There is no evidence that the *Stereoscopic Company* would not then have renewed the contract.

(3.) Too large a sum has been given by the Chief Clerk; a wrong measure of damages has been adopted. The true measure is the difference between the prices which the Plaintiff would have obtained under the contract and the prices which he would have obtained in the market: *Mayne* on Damages (2). The Plaintiff's evidence shews that there was a market for his cameras. He ought to have done what he could to reduce the damages by endeavouring to sell his cameras in the market; and the damages would have been less if he had applied for the injunction sooner. If the contract with the company had been completed there would have been no damage at all, for then the Plaintiff could have enforced the contract. But it was not completed. There was no malice on the part of the Defendant; he was led by the company's question to say what he did. The damages should be what must reasonably have been in the contemplation of the parties.

Moulton, Q.C., and *Micklem*, for the Plaintiff:—

Looking at the correspondence as a whole, it is clear that the contract was broken off by reason of the Defendant's threats. Before the 15th of February the company had instructed their solicitors to prepare a draft contract with the Plaintiff. They broke off the negotiations immediately they received the letter from the Defendant.

The rule that damages must be what was reasonably in the contemplation of the parties has no application to a tort. There

(1) Law Rep. 9 C. P. 139. (2) 5th Ed. p. 170.

is only one party to a tort—the wrongdoer. In such a case the damages ought to be as nearly as possible an indemnity to the Plaintiff. If there is any doubt about what the Plaintiff has lost, it is because, owing to the Defendant's tort, the proposed contract was not carried out. The doubt should operate against the wrongdoer. The Plaintiff has proved that he lost a valuable contract; it is for the Defendant to shew that he is entitled to any set-off. The Chief Clerk has fairly estimated the profit to be anticipated from the contract.

T. Terrell, in reply:—

The Court is asked in effect to infer, in the absence of evidence, that the loss of the contract was caused by what the Defendant did. Special damages must be a legal and natural consequence of the Defendant's act: *Vicars* v. *Wilcocks* (1).

NORTH, J.:—

In my opinion the Chief Clerk's certificate is right. The first question to be considered is whether it was by reason of the Defendant's conduct that the Plaintiff was prevented from getting the contract with the *Stereoscopic Company*. The negotiations between the Plaintiff and the company commenced in November, 1891, and then the terms were, I do not say legally, but practically settled between them of a contract which would have been very advantageous, according to the evidence, for the Plaintiff. The company wished to be safe, and something was said in the course of the correspondence, before any formal agreement had been drawn up, which led to some doubt as to the Plaintiff's having a title to the patent which would enable the company, if they took a license to work it, to get the full benefit of the license for which they were willing to pay. That was mooted in the correspondence. [His Lordship read the letter of the 11th of January, 1892, from the company to the Plaintiff.] That is the beginning of the difficulty which arose respecting the completion of the contract which was in negotiation between the Plaintiff and the company. Further letters passed, and on the 1st of February the company wrote to the

(1) 8 East, 1.

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Plaintiff. [The learned Judge read the letter.] It is clear, therefore, what the view of the company was. They had to give up what they considered an advantageous contract both to the Plaintiff and themselves, because it would in all probability involve them in litigation, to which they would not under any circumstances be parties. They treated it as if it was only negotiation, and that it was perfectly open to them to throw it up if they liked. The Plaintiff took a different view, and a view which his counsel does not now contend was legally well-founded; but the view was that there was already an existing contract which could be legally enforced, and he wrote to that effect on the 3rd of February, 1892.

Then, after one or two other letters, in which the company took the view that the contract was cancelled, and the Plaintiff took the view that it was binding, the *Stereoscopic Company* approached the Defendant, the Defendant being the owner of the camera which was said to have anticipated the patent held by the Plaintiff, in respect of which he was proposing to do work for the company, and the company naturally enough took this view: "We think we are out of it, and we will not enter into what will be a subject of litigation; on the other hand, that will not necessarily relieve us from litigation, because we are threatened with litigation by the Plaintiff, who says that there is a legal agreement; and therefore, with a litigant threatening us on either side, what is the best thing for us to do?" It was not common ground that the negotiations were at an end, because the Plaintiff was saying they were not. The *Stereoscopic Company* asserted that they were. Then what do the company do? They take what seems to me a very reasonable course. They try whether the existing difficulty can be removed, and they communicate with the Defendant. It turns out that the Defendant took the view which the *Stereoscopic Company* had thought it likely he would take, viz.—that the Plaintiff's patent was an infringement of the Defendant's patent, and I see no reason whatever for believing that, at that stage at any rate, whoever was right or wrong, it was not the *bonâ fide* view on the one side that the Plaintiff's was a good patent, and on the other that the Defendant's was an anticipation of it.

That being so, after more correspondence, and an interview or two has taken place, we get the letter of the 18th of February, 1892, from the Defendant to the *Stereoscopic Company*. [His Lordship read it.] That letter has been decided to be a threat in respect of which the Plaintiff had a right of complaint. This was followed by a communication of the 19th of February, 1892, from the solicitors of the *Stereoscopic Company* to the Plaintiff, which speaks of their having been consulted, and states that their letter is written by the instructions of the *Stereoscopic Company*. The company, of course, being a corporation, could not write a letter, but had to act by their agents, and this letter was written by their legal advisers on the instructions of and in consultation with Mr. *Mitchell* and Mr. *Humphreys*, but Mr. *Mitchell* particularly, he being the managing man for the company in respect of such a matter as this. It informs the Plaintiff that the negotiations for an agreement were entirely at an end. It says: "The result is that they (the company) have received from Messrs. *Shew & Co.* a letter, of which we send you a copy. Under these circumstances it is absolutely impossible for our clients to continue any negotiations for an agreement. However useful your invention may be, they cannot submit themselves to the risk of a law suit. We are, therefore, instructed to inform you that our clients decline to continue the negotiations, at the same time desiring us to express their regret that both you and they should have been put to any inconvenience in the matter." Now it is said that that letter is not evidence. In my opinion it clearly is. But evidence of what? First of all, I do not think it is disputed that it is evidence of a final repudiation of the alleged agreement, or at any rate a final termination of the negotiations for the agreement for the license which had been talked of. It is clearly evidence on that point. It is the means by which the *Stereoscopic Company*, through their agents, communicate this to the other parties. Then it is said, although it may be evidence on that point, it is not evidence of the statements made in it. To some extent it clearly must be evidence of the statements made in it; but to what extent? It shews that a certain communication passes from the *Stereoscopic Company* to the Plaintiff, and for the purpose of seeing what the

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communication is, I must refer to the contents of the letter, and then what I find is this. It is a statement that, by reason of the litigation threatened against us by the Defendant, we can no longer go on with the negotiations with you, the Plaintiff, for the contract contemplated. It is said that I ought to split that in two, and accept the statement that the company repudiated the contract, without accepting the statement of their reason for doing so. In my opinion, I cannot separate the two. It is one definite statement, and it is one proposition: "We repudiate the contract on this ground;" and I cannot divide it, or take half as evidence without taking the other half as evidence also. But to say that it is evidence is one thing; to say that it is conclusive is a totally different one, and, though I think it is clearly admissible in evidence, it does not at all follow that the statement is to be taken as correct. It is perfectly open to the other side, who dispute it, to say, "It is quite true you sent that letter repudiating the agreement or the negotiations, but the reason you give for doing so is untrue." It would be perfectly open to the Defendant to say that, and the fact that the writers gave this reason is not in any way conclusive evidence that that really was the reason. But it is the reason alleged, and it cannot be said that the letter, which is evidence of the thing being done, is to have no attention whatever paid to it in its statement in the same paragraph of the reason for which that step is taken. In my opinion, therefore, the letter is evidence of the reason for which the act was done, because it is a letter sent on behalf of the *Stereoscopic Company* by the persons who were authorized by them to send that communication.

I have spoken of this letter; but, when I look at the other letters which passed between the parties, I have not the least doubt that the real reason was that which is suggested in this letter. Therefore, upon the correspondence as it stands, there is evidence that the negotiations, which had been put an end to in January and the beginning of February, were revived and were continued between the parties; and the fact that they were continued at this time cannot be more clearly proved by anything than this: that it is in evidence that between the 10th and the 15th of February a draft agreement to give effect to the nego-

tiations for a contract was actually prepared by the solicitors on behalf of the *Stereoscopic Company*, though circumstances made it unnecessary ever to complete it.

Then, in addition to that, three or four passages in the evidence support the view that the agreement was broken off on the ground stated in that letter. Mr. *Mitchell* himself states it in his affidavit, and Mr. *Skinner* says the same thing. It is quite true that Mr. *Skinner* does not know much about it. If it turned upon his knowledge or information his statement would not be of great importance; but the conduct of all the parties throughout puts it upon this ground, and no one ever has suggested from first to last that there was, nor do I find a trace of there being, any other ground on which it could possibly be put; and I believe the statement the more readily, because I am satisfied on the correspondence that it was this which caused the giving up of an arrangement which both parties contemplated would be for their mutual benefit.

Then I should add this: that being the state of the evidence, in consequence of what passed before the Chief Clerk—I will not say what it was because the parties do not agree about it—an adjournment of the matter took place in order that certain witnesses might be called. Mr. *Skinner* was called and cross-examined, and Mr. *Mitchell*, Mr. *Butler Humphreys*, and Mr. *Collette*, the solicitor, were also called and examined. If there was any doubt whether the alleged reason for breaking off the negotiations was an untrue reason, these were the very persons who could have given express information on the subject. The counsel for the Defendant, in the exercise of his discretion, did not choose to put any question to them upon it. I do not say he was bound to do so. He might abstain if he liked; but I do not think it would be right to pay much attention to the alleged absence of evidence when there was, at least, what I consider *primâ facie* evidence on the subject, and when he, having had the opportunity of testing that evidence, in the exercise of his discretion, abstained from doing so.

I think, therefore, there is sufficient evidence on that point. If I had not thought so, I should not have found there was no damage, but I should have had those witnesses brought here, and

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thus supplied any defect which there might have been by reason of counsel, on either side, having omitted to ask a material question. I should not allow justice to be defeated by any slip of that kind. I should have done this if I had thought it necessary, even though I was not asked to do so by the parties; but I have not thought it necessary to do so, because, looking at the correspondence, and at what passed between the parties, I do not think there is any doubt as to the ground on which the negotiations were broken off, viz., that it was because of the existence of the threat by the Defendant of legal proceedings. I think, therefore, that the Plaintiff has made a case entitling him to damages.

Then the question is, what are the damages. The Chief Clerk has allowed the sum of £700, and he has proceeded on this footing. He calculates the profit which would have been made by the Plaintiff on the contract, if it had gone on. The contract, which was in negotiation, was that the *Stereoscopic Company* should take from the Plaintiff a fixed minimum quantity of goods, although the letters stated, and the parties believed, that the actual amount delivered would be a good deal greater. The *Stereoscopic Company*, who were likely to be able to form a good opinion on that point, thought so; and further, I think Mr. *Moulton's* suggestion is a very businesslike one: that, when the company guaranteed that they would take a minimum quantity, they would reasonably expect to be able to exceed the minimum which they guaranteed; and so they said in that letter. That being so, the Chief Clerk took first of all the minimum number. He took the figure of profit which had been calculated, and he reduced the allowance per camera to £1 15*s*. Then he found that at that rate the profit came to £300 a year, and he allowed that amount for two years. The contract, if it had been entered into, would have been for three years. Although I have spoken of "years," "seasons" is rather the proper term, because it is only during part of the year that the wholesale manufacturer can usefully prepare goods for the coming season, and the times which the parties agree upon now, and which the Chief Clerk has adopted, are these: that the first year commenced on the 1st of March, 1892; the second year on

the 1st of March, 1893; and the third, on the 1st of March of the present year. As regards the third year, he has not allowed anything, because, he said, the parties are at arm's-length now. If the Plaintiff's patent is worth anything now, as he says it is, he has now full opportunity of getting from the trade, in the market at least, what he would have got from the *Stereoscopic Company*. Further, this must be borne in mind: that, if the contract had gone on, the Plaintiff's business must have been confined to dealing with the *Stereoscopic Company*, who would have been his only customers. Now that the contract is at an end, it is open to the Plaintiff to sell his patented article to any person in the world whom he can induce to buy it. The Chief Clerk, therefore, rejected the idea of there being any loss of profits for the third year. The first year expired, as I have said, on the 1st of March, 1893; but by May, 1893, all the valuable part of the second year, that is, the second season, had expired. When the infringement action was stayed that season was over. Therefore, the Chief Clerk, finding that the Plaintiff had lost two seasons, allowed him profits for the two years. The £600 is arrived at on the footing of the minimum number only having been sold. The Chief Clerk has allowed something more for two years' profits on extras, &c. It is not proved that exactly that number of pounds was lost, and of course it could not be, inasmuch as the contract did not go on; and all that one can do is to arrive, as nearly as one can, at what would have been made if the contract had gone on, it being the fact that nothing actually was gained or lost. It seems to me the Chief Clerk has taken a not unreasonable figure. It is not a large figure. It extends over the whole of two seasons. When it is said that the Plaintiff must prove loss by pounds, shillings and pence, I dissent altogether, because it is impossible to shew precisely what amount of pounds, shillings and pence would have been realized under a contract which has never been actually completed.

That, I think, disposes of the figures. It was said that the profit was not the proper measure of the damage; but it seems to me clear that when the question is, what damage the Plaintiff has sustained by reason of the breach of a contract, he has lost

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the profits which he would otherwise have gained. It was said by Mr. *Terrell* that the measure ought to be the difference between the amount which would have been received under the contract, and the amount which might have been realized by the Plaintiff, if he had gone on manufacturing the articles and selling them in the market; and that it is only that difference with which the Defendant ought to be charged. But it was impossible for the Plaintiff to go on manufacturing the article in question—at any rate, whether impossible or not, it does not lie in the Defendant's mouth to say it was possible—because, in the first place, the Defendant began by alleging that anything which the Plaintiff might do under his patent would be an infringement of the Defendant's patent. That was the threat actually made, and although the Defendant was restrained from repeating the threat to other parties to the prejudice of the Plaintiff, yet that could not prevent the threat made by the Defendant to the Plaintiff from remaining as an operative threat, and a continuing warning from the Defendant to the Plaintiff, that, if he chose to manufacture these articles, he must take the risk of proceedings being commenced against him by the Defendant. It did not rest merely on the fact that the letter of warning was not withdrawn; but the Defendant brought the case to trial before me. He was not content then. He went to the Court of Appeal, and, when the Court of Appeal took the same view as I did, the Defendant obtained a stay of the inquiry as to damages to enable him to bring an action against the Plaintiff to restrain him from doing the very thing which the Defendant now contends the Plaintiff ought to have been doing all along, not for his own benefit, but for the benefit of the Defendant, who was not only telling the Plaintiff not to do it, but at this very time had actually commenced an action to prevent him from doing it. That action came to nothing, and was discontinued in May, 1893, and from that time forward the Plaintiff was entitled to manufacture his own article, and there were no threats to prevent him; but by that time the second season had been lost, and that is the reason for which two years' profits have been given.

That being so, in my opinion the Chief Clerk has made a certificate with which I cannot interfere. I cannot say that it is

absolutely right, because it is impossible to say precisely what amount in pounds, shillings and pence would have been received, if something which the Defendant prevented from taking place had taken place; but it is I think as near an estimate as can be arrived at by the Chief Clerk of the damages sustained, and so far as I can see he has arrived at a right conclusion.

The summons to vary will be dismissed with costs.

Solicitors: *Watkins, Baylis, & Co.; Waterhouse, Winterbotham, & Co.*, agents for *Cozens-Hardy & Jewson, Norwich.*

W. L. C.

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May 23.

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[1889 B. 5167.]

Trader—Business carried on by Executor—Administration—Receiver and Manager—Debts incurred by Executor—Indemnity—Rights of Creditors of Testator and subsequent Creditors of Executor—Trade Machinery—Mortgage—Conveyance of Land mentioning Fixtures—Bill of Sale.

The principle of *Dowse* v. *Gorton* (1)—that an executor carrying on a testator's business with the assent, either express or implied, of the testator's creditors is entitled (in priority to the testator's creditors) to be indemnified out of the estate against the liabilities properly incurred by him in carrying on the business—is applicable where a receiver and manager has been appointed in an administration action to carry on the business in succession to the executor, and whether the will does or does not contain a power to carry on the business.

The principle of *In re Yates* (2)—under which a conveyance of land and buildings used for a business passes the fixed trade machinery on the premises, though not expressly mentioned, and therefore is not a bill of sale of the machinery—applies equally where the conveyance expressly mentions the fixed trade machinery, either by reference to a schedule or otherwise.

Small v. *National Provincial Bank of England* (3) considered.

By an indenture of mortgage dated the 24th of November, 1887, and made between *John Brooke*, paper manufacturer, of the one part, and *Thomas Owen* of the other part, after reciting that, in consideration of the sum of £10,000 owing by the said *John Brooke* to the said *Thomas Owen*, the said *John Brooke* and his wife had, on the date but before the execution of the mortgage, "surrendered the hereditaments and premises hereinafter expressed to be hereby assured," into the hands of the lord of the manor of *Wakefield*, in the county of *York*, whereof the same were holden, to the use of the said *Thomas Owen*, his heirs and assigns, at the will of the lord according to the custom of the manor, subject to a certain yearly rent-charge therein referred to, and to a proviso or condition for making void such surrender upon payment by the said *John Brooke* to the said *Thomas*

(1) [1891] A. C. 190. (2) 38 Ch. D. 112.
(3) [1894] 1 Ch. 686.

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Owen of the said sum of £10,000 on the day therein mentioned with interest at 5 per cent. per annum; and that it was agreed that the payment of the said sum and interest should be further secured in manner thereinafter appearing: It was witnessed that the said *John Brooke* thereby covenanted with the said *Thomas Owen* to pay to him the said sum and interest on the day aforesaid and to pay interest at the rate aforesaid so long as the said principal sum should remain unpaid after that day; and it was also witnessed that the said *John Brooke* did thereby "grant and convey" to the said *Thomas Owen* a piece of land situate at *Soyland*, in the manor of *Wakefield*, with the mill, messuage or tenement thereon known as *Soyland Mill*—which was a paper-mill belonging to *John Brooke*—"and the fixed machinery and fixtures in and upon the said premises (which said machinery and fixtures are specified in the schedule hereto)," and all rights, &c., to hold the same unto and to the use of the said *Thomas Owen*, his heirs and assigns, at the will of the lord, according to the custom of the said manor, and under the rents, fines, &c., and subject to the said yearly rent-charge, and also to a proviso that on payment of the said sum and interest on the day aforesaid the assurance thereby made should be void. Then there was a covenant by the said *John Brooke* that he, his heirs, executors, administrators or assigns, would, during the continuance of the security, keep the said mill, "machinery and fixtures comprised in and subject to this security, and all buildings, machinery, fixtures and property which may from time to time be so comprised or subject, in good and substantial repair, and in perfect working order," and also insured against loss or damage by fire. At the end of the deed was a schedule of "fixed machinery and fixtures" in the mill. The deed was not registered as a bill of sale.

By an indenture of the 4th of February, 1888, *Thomas Owen* transferred the mortgage to *Edward Sewell Robinson, John Reeves Brown*, and himself.

Thomas Owen was also a separate creditor of *John Brooke* for a sum of £1800 and interest secured by bond.

John Brooke died on the 6th of September, 1888, having by his will, dated in 1878, appointed his wife *Jane Elizabeth Brooke*,

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and two other persons, his trustees and executors, and devised and bequeathed to them his residuary real and personal estate upon trust for his wife during widowhood, and after her death or future marriage to sell the same and divide the proceeds among his children equally. The will contained no power or direction to carry on the testator's business. The will was proved by the testator's widow alone, the other trustees having died or disclaimed. After the testator's death his widow carried on his business at *Soyland Mill*, in course of which she sold some of the fixed machinery comprised in the schedule to the mortgage, and received the proceeds—£400.

In August, 1889, the widow entered into a provisional contract for the sale of the mill, but the sale fell through; and in November, 1889, this action for administration of the testator's estate was commenced against the widow by two daughters of the testator, who, besides being beneficiaries under his will, were also creditors of his estate for sums advanced by them to him in his lifetime.

On the 29th of November, 1889, judgment for administration was pronounced, directing a sale of the testator's real estate to make good any deficiency in the personal estate to answer the debts; and the Defendant, the widow, was appointed receiver of the income of the real estate and to get in the personal estate, and also manager of the testator's business.

By an order dated the 20th of January, 1890, the mortgagees of the mill, and also *Thomas Owen*, in respect of his separate bond debt, obtained liberty to attend the proceedings.

While carrying on the testator's business after his death the widow paid off several of his creditors, but at the same time herself incurred considerable debts in carrying on the business, which debts still remained unpaid.

By an order dated the 5th of February, 1890, the widow, the receiver and manager, was, on her own application, discharged, and *Birtwhistle* was appointed receiver and manager in her place.

By an order made on the 5th of March, 1890, upon the application of the mortgagees, the widow was ordered to pay into Court, to the credit of the action, "proceeds of sale of machinery,"

the sum of £400, being the proceeds of sale of part of the machinery included in the mortgage of 1887 which the widow had sold, she admitting having received such proceeds, and agreeing that the receiver should, out of the moneys in his hands, set apart £400 to meet any claim by the Applicants as mortgagees.

By an order made the 14th of July, 1890, on the application of the Plaintiffs, *Birtwhistle* was discharged from the receivership, and *James Duff* was appointed receiver and manager in his place.

By an order made on the 30th of June, 1891, upon the application of the Defendant, leave was given to *Duff* to sell to the person therein named one of the machines in the mill, and mentioned in the schedule of the mortgage, for £50, such sum being ordered to be paid to the mortgagees in reduction of their mortgage debt.

By an order dated the 22nd of July, 1891, *David Scott*, a trade creditor of the Defendant, the widow, for a debt incurred by her during the time she was carrying on the business, was appointed to represent the class of creditors of the widow since the death of the testator, and an inquiry was directed what moneys forming part of the testator's estate had been properly expended, and what debts and liabilities had been properly incurred, by the Defendant in carrying on the testator's business, and what now remained due in respect of such debts and liabilities; also an inquiry to what amount (if any) the executrix was in default to the testator's estate.

By his certificate dated the 11th of August, 1893, the Chief Clerk allowed the Plaintiffs' debts claimed by them, and also the £1800 claimed by *Thomas Owen* to be due to him on the testator's bond, and certified also for certain other debts. He also found that the personal estate was insufficient for payment of the debts in full; that a small balance was due from the Defendant as executrix and as receiver and manager; that the sum of £9950, with interest, remained due upon the mortgage of 1887; that the debts and liabilities properly incurred by the Defendant in carrying on the business, and then remaining due, amounted to £13,074; and that the Defendant, the executrix, was not in default to the estate.

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The action now came on for hearing on further consideration, the main questions for argument being, first, whether the Defendant was entitled, in priority to the persons to whom the testator was indebted at the time of his death, to be indemnified out of the estate against the amount certified for debts and liabilities properly incurred by her in carrying on the testator's business; and, secondly, whether the £400 paid into Court under the order of the 5th of March, 1890, to the account, "Proceeds of sale of machinery," and now represented by a sum of £428 New Consols, properly belonged to the mortgagees under the mortgage of 1887, and should therefore be paid out to them: in other words, whether the mortgage was a valid security as to the fixed machinery and fixtures, having regard to the *Bills of Sale Acts.*

With regard to the second point, it appeared from the evidence that the machinery sold by the Defendant for £400, and which was specifically mentioned in the schedule to the mortgage, consisted of a set of "glazing rolls," or "callenders," which were sold in consequence of their having become useless.

Prior to the sale the Defendant consulted the mortgagees, who assented to it, provided the proceeds were applied in reduction of the mortgage debt. The proceeds of sale, £400, having been received by the Defendant, were, according to the evidence, expended by her, together with other sums amounting to over £1000, but apparently without the knowledge of the mortgagees, in the purchase of "new plant and machinery" for the mill, "a considerable portion" of which, it was said at the time on behalf of the Defendant, "would be comprised in the term 'fixtures,' and would accordingly become included in the mortgage." What particular machinery was substituted for the glazing rolls themselves, the evidence did not shew.

Subsequently, in December, 1889, upon the mortgagees inquiring what had been done with the £400, the Defendant admitted having received it, and expressed her willingness to account for it.

A summons was also taken out by the mortgagees for leave to instruct a surveyor to report as to what works were necessary to put the mill and machinery in proper repair and working order in accordance with the covenant in the mortgage deed, and for

directions to forthwith carry out such work. The prepared minutes of order on further consideration proposed that the mill should be stopped at an early date, as the mortgagees were about to call in the mortgage debt; and the contention of the mortgagees was that, as the mill had been carried on since the testator's death ostensibly for the benefit of the other creditors, it ought not to be left in a state of disrepair when the mortgagees were about to realize their security. The evidence as to the state of repair included an affidavit by *James Duff*, the receiver and manager, from which it appeared that the mill was "in thoroughly good and substantial repair, and in perfect working order."

This summons was set down for hearing with the further consideration.

Macnaghten, for the Plaintiffs:—

The first question is whether the Defendant, the executrix, is entitled to be indemnified out of the testator's estate, in priority to his creditors at his death, against the liabilities incurred by her in carrying on his business since the death, upon the principle of *Dowse* v. *Gorton* (1).

Renshaw, Q.C., and *A. Whitaker*, for the mortgagees, and for *Thomas Owen*, as a bond-creditor of the testator:—

In *Dowse* v. *Gorton* the will contained express power to carry on the business, and the testator's creditors, whose debt consisted of the purchase-money agreed to be paid by the testator on his purchase of the business, required that the business should be carried on until the purchase-money was paid. Here, the will contains no such power; the mortgagees have abstained from consenting to the business being carried on, and the administration proceedings were commenced behind their backs. Moreover, the business is being carried on by a receiver under an order of the Court, that is to say, by the Court through its own officer, who has not the right of an executor. There is no reported decision that, where the Court is itself carrying on the testator's business, the principle of *Dowse* v. *Gorton* applies.

(1) [1891] A. C. 190.

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[KEKEWICH, J., read the observations of Lord *Macnaghten* in *Dowse* v. *Gorton* (1).]

We intervened as soon as we could, in order to prevent the estate from being wasted by the friendly creditors who had commenced the action. Lord *Macnaghten* is referring only to a case where there is no action. Lord *Herschell* says (2) that the mere fact that a creditor stands by while the business is being carried on by the executor solely to enable it to be sold as a going concern, and does not immediately take steps to enforce his debt, does not of itself entitle the executor, as against him, to be indemnified out of the estate.

Warmington, Q.C., and *Upjohn*, for the Defendant, the widow, and for *David Scott*, representing her trade creditors, were not called upon.

KEKEWICH, J.:—

In my opinion this point is concluded by *Dowse* v. *Gorton* (3). If I am wrong in that view, I hope I shall be set right at the earliest possible moment, because this is only an illustration of a class of cases which has come before me frequently, and I have always acted on what I believed to be the result of *Dowse* v. *Gorton*, and the natural result of that case as applied to a particular set of circumstances. No doubt, in *Dowse* v. *Gorton* there was a power in the will to carry on the testator's business; but, as was pointed out by Lord *Macnaghten*, that direction, though binding on the beneficiaries, was not binding on the creditors; and therefore, when you come to consider the rights of the creditors, the direction to carry on the business is of very little moment. The view which it appears to me Lord *Herschell* and Lord *Macnaghten* took is what I will mention presently, though I am perfectly aware it is impossible for me to put in more accurate language what is stated by those noble and learned Lords; but I may point out that the opinion of Lord *Macnaghten*, to which I have referred, is not the opinion of himself alone expressed independently, but that it is the opinion of the House,

(1) [1891] A. C. 203-4. (2) [1891] A. C. 199.
(3) [1891] A. C. 190.

and for this reason. Lord *Herschell*, in his speech, deals more particularly with the facts of the case, but, at the same time, he by no means negatives the view taken by Lord *Macnaghten*; on the contrary, he confirms it, for, towards the end of his speech (1), he says: "Since writing my opinion I have had the advantage of reading the opinion prepared by my noble and learned friend Lord *Macnaghten*;" and then he states his concurrence in the view expressed by Lord *Macnaghten*. So that the judgment of the House was a reserved judgment in which the Lord Chancellor did not state the view of the law expressed by Lord *Macnaghten* because he knew what was to be said by Lord *Macnaghten*. Lord *Hannen* also says (2): "I have had the advantage of reading the opinions which have just been delivered by my noble and learned friends who have preceded me, and I concur." So that it is a case in which the judgment of each of the learned Lords who took part in the decision is part of one opinion of the House.

In a case of this kind, where, after the death of a trader, the business is carried on by the executor for some time, and then ultimately there is a conflict between the creditors, properly so called, of the testator, and the creditors of the business, that is, of the executor who carries on the business out of the assets of the testator, then it is for the creditors of the business to shew, if they can, that the business was carried on with the assent of the creditors of the testator, or for the creditors of the testator to shew the contrary. The creditors of the testator have their own remedy: they can step in at any time. They must be presumed to know of the death of the testator, and that the business is being carried on by the executor, and the law says that that cannot be done without their assent. Therefore, if they have not interfered, they must be treated as having assented, and the indemnity of the executrix follows by reason of their assent. These views are, though I have expressed them in my own language, what I understand to be the result of the decision in *Dowse* v. *Gorton* (3). Accordingly, it is for the Court in every case to consider what is the proper inference to be drawn from the facts. Now, is there here any reason for inferring that the business of the testator

(1) [1891] A. C. 201. (2) [1891] A. C. 209.
(3) [1891] A. C. 190.

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was not being carried on by his executrix with the assent of the creditors of the testator? I find none whatever; because the only creditor now resisting the claim of the executrix to an indemnity is a creditor who knew perfectly well—at all events, after the date of the judgment in this action—that the business was being carried on in this particular way. I should be prepared to infer that he knew that fact long before the judgment. At all events, he knew it within two months after the judgment. He had notice as a mortgagee, and therefore cannot say he did not know as a creditor. He knew in January, 1890, that the business was being carried on. Accordingly, I have no difficulty in holding, as to this particular creditor, that this business was being carried on by the executrix with his assent.

But there is another point. After eighteen months from the death of the testator the business was carried on, not by the executrix, but by an officer of the Court under an order appointing him receiver and manager, and directing that the business should be carried on. It is said that makes all the difference. Mr. *Renshaw* and Mr. *Whitaker* say, "How could we possibly intervene?" The fact that the business is being carried on by an officer of the Court cannot affect the rights of the parties. The receiver is appointed at the instance of the creditors, and he is none the less a receiver for the creditors because he has been appointed by, and is accountable to, the Court; and it appears to me that the creditor who comes and objects to the business having been carried on is all the more bound where he not only knew that the business was being carried on, but knew that it was being carried on under this solemn sanction. And there would have been no difficulty in his intervening earlier. The case which the creditor is now setting up is that a friendly creditor is wasting the estate so that he, the objecting creditor, is likely to lose his lien on the estate; but that is a state of circumstances which ought to have put him still more on his guard, and he could have obtained an injunction to put matters right. The Court has never allowed a friendly creditor to prevent the assertion of the rights of persons who consider themselves hurt by a friendly judgment.

I am clearly of opinion that this particular creditor must be

regarded as having assented to this business being carried on, first, by the executrix, and then by the receiver, and that the executrix is entitled to an indemnity, according to the principle of *Dowse* v. *Gorton* (1).

The next question, which was raised by the mortgagees' summons, was whether the mortgage of 1887 was a valid security as to the fixed machinery and fixtures, so as to entitle the mortgagees to payment out of Court of the £400.

Renshaw, Q.C., and *A. Whitaker*, for the mortgagees:—

The £400 represents the proceeds of the glazing rollers that were taken out of the mill and sold. These rollers are specifically mentioned in the schedule to the mortgage of 1887, and form part of our security. We are therefore entitled to have the proceeds applied towards payment of the mortgage debt.

In the next place, we do not come within the recent decision of Mr. Justice *Stirling* in *Small* v. *National Provincial Bank of England* (2), for there the conveyance was not simply of land and fixtures as we have here, but of land together with the fixed and "moveable" plant, machinery, and fixtures. This case is really covered by *In re Yates* (3), where there was a mortgage of land without reference to the fixed "trade machinery" upon it, and it was held that the mortgage was not an assignment of the machinery, since it only passed by virtue of being affixed to the freehold, and could not be taken possession of without possession of the land; and accordingly that the instrument was not a bill of sale within the *Bills of Sale Acts*. So here, this conveyance of the land passes the fixtures also, and would have passed them even without express mention: they are mentioned simply for the purpose of being identified in the schedule. There is no separate assignment of the fixtures to bring the case within the *Bills of Sale Acts*. Accordingly, this is a valid security as regards the fixtures.

Warmington, Q.C., and *Upjohn*, for the Defendant, the executrix, and for *David Scott*, representing her trade creditors:—

As to the first point, the £400 was, according to the evidence, expended by the Defendant, the executrix of the mortgagor, in

(1) [1891] A. C. 190. (2) [1894] 1 Ch. 686. (3) 38 Ch. D. 112.

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new machinery, which she had the right to do, for the mortgage, especially in the covenant to repair and insure, clearly contemplates that machinery may from time to time be substituted for original machinery specified in the schedule. Therefore the fund in Court does not represent the machinery sold at all, and does not belong to the mortgagees. As to the second point, the conveyance is not to be treated as a conveyance of the land, for that had already passed by the conditional surrender. That is a proper copyhold assurance, and constitutes the true title to the land. The contemporaneous conveyance therefore operates as nothing more than an assignment of the machinery—that is, of the machinery specifically described in the schedule; and sect. 19 of the *Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. c. 41), empowers the mortgagee to sell the machinery separately as "part of" the security. So that we have here a separate assignment of specific machinery which the mortgagee has power to sell separately. The case therefore falls within *Small* v. *National Provincial Bank of England* (1), for, as Mr. Justice *Stirling* said in that case (2), we have not simply a conveyance of land and fixtures, but of fixtures which are expressly and separately mentioned; whereas in *In re Yates* (3) the mortgage was perfectly silent as to machinery. We submit, therefore, that this is a bill of sale, and, as it does not fulfil the requirements of the *Bills of Sale Acts*, is invalid.

Macnaghten, for the Plaintiffs, creditors of the testator, took the same view.

Renshaw, in reply:—

The evidence that the £400 was actually expended in new machinery is too vague. It only says that this sum was expended with other sums in the purchase of new plant and machinery, part of which, it was believed, would be comprised in the security under the term "fixtures." There is no evidence as to what was substituted for the rollers sold. It was expressly stipulated that the proceeds of the rollers should be applied in reduction of the mortgage debt.

(1) [1894] 1 Ch. 686. (2) [1894] 1 Ch. 691.
(3) 38 Ch. D. 112.

KEKEWICH, J.:—

It will be convenient to take the points in reverse order. First, with regard to the question whether the present case falls within *In re Yates* (1), before the Court of Appeal, or within *Small* v. *National Provincial Bank of England* (2), before Mr. Justice *Stirling*. That those two cases are distinct is common ground. Of course, if Mr. Justice *Stirling* had had before him a case similar to that before the Court of Appeal, his duty would have been to follow the Court of Appeal, and not to follow the judgment of a Court of first instance in a similar case. The learned Judge came to the conclusion he did in the case before him, because there was considerable difference between the two cases. My difficulty is that the case before me is not on all-fours with either of those cases. It is not on all-fours with the case before the Court of Appeal, because there the mortgage was of land, carrying with it, by force of the legal meaning of the words used, the fixtures attached; and it is not on all-fours with the case before Mr. Justice *Stirling*, because there the learned Judge had before him an express mention of the fixtures, with an addition which I have not here. The words were, "Together with all and singular the fixed and moveable plant, machinery and fixtures, implements and utensils now or hereafter fixed to or placed upon or used in or about the said hereditaments and premises respectively." That is to say—still dwelling on the distinction between this case and that before Mr. Justice *Stirling*—here there is only a conveyance of property with "the fixed machinery and fixtures in and upon the said premises (which said machinery and fixtures are specified in the said schedule hereto)"; whereas in the other case there was a conveyance, not only of fixed machinery, but also of "moveable" plant and machinery; and, further, of fixed and moveable plant and machinery "hereafter fixed to or placed upon or used in or about the said hereditaments and premises respectively." So that in that case there were two large distinctions from the present case to which some importance must be attached. Now, why did Mr. Justice *Stirling* consider the case before him distinguishable from that before the Court of Appeal? Because—

(1) 38 Ch. D. 112. (2) [1894] 1 Ch. 686.

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as I read his judgment—of those words which I have read, and of the meaning he attached to those particular words. He states correctly the law in the first instance; but when he comes to explain the *ratio decidendi* of his judgment he seems to me to rest entirely on those words. He says he had "to be satisfied that the object of the parties was merely to secure, by way of precaution, that something should pass which would have passed under a conveyance of the land alone, without any reference to the fixtures"; and, before criticising the words, he says he cannot be satisfied this was the object, but that he is satisfied that something else was intended to pass by the words used—that is to say, not only what the law would give by virtue of the conveyance of the land, but what the law would not have given without those words. Here I have simply the words "fixed machinery and fixtures" specified in a schedule and attached to the buildings at the date of the mortgage. Therefore this case is not distinguishable from *In re Yates* (1). It is true that in that case there was no express mention of fixtures; but here there is. In my opinion, however, the principle of *In re Yates* is applicable to a case in which fixtures are conveyed by express words, just as if they are conveyed by being attached to the freehold. The argument against that is, that the mortgagee might, if he chose, sell the fixtures independently of the buildings to which they belong, and that that follows from the words of the power of sale which, in this case as well as *In re Yates*, is contained in sect. 19, sub-sect. 1, of the *Conveyancing and Law of Property Act*, 1881. There a power is given to the mortgagee "when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof," either together or in lots. The answer, in my opinion, is given in the plainest form by Lord Justice *Bowen*, who deals with this question more fully and precisely than the other Lords Justices; and he puts the case of a mortgagee of a house selling the chimneys without selling the rest of the house. After referring to the question whether, under the power given to a mortgagee by that section, to sell the mortgaged property "or any part thereof,"

(1) 38 Ch. D. 112.

a mortgagee of a freehold estate on which there were trade machinery or fixtures could sever the fixtures and sell them as if they were a part of the mortgaged property, he says (1): "I cannot think that this was the intention of the section. I think the framers intended that what was sold should be a separable part of the mortgaged property in the state in which it was subjected to the mortgage." It appears to me that, apart from any criticism of the words of the instrument, you cannot say that fixed machinery which was conveyed to the mortgagee as part of the premises to which it was attached is a separable part of the mortgaged property in the state in which it was subjected to the mortgage. Therefore, unless there is something to the contrary in the document, it appears to me that the principle of *In re Yates* (2) is applicable to such a case as this, and that this case is not touched by Mr. Justice *Stirling's* decision.

Now let us look at the deed. It is somewhat unusual in form. There is no question that it is not in the old-established form, because, in the first place, there is a conditional surrender of even date (the property being copyhold) of the "hereditaments and premises hereinafter expressed to be hereby assured"; that is to say, with the fixtures, precisely in the same way as in the accompanying deed. Speaking from my recollection, it is not usual, in a conditional surrender which is intended to be entered on the Court rolls, to do more than describe the copyhold property, and this is done in the shortest possible form consistent with identification. I see no objection to the words I have read having been put in; but, beyond that, it is to some extent not in the usual form, because the contemporaneous deed is not, as is usually the case in a mortgage of copyholds, in the form of a covenant to surrender, but in the form of a conveyance; and it purports to operate as a conveyance, not only of the land, but also of the machinery. It is said, Why is it necessary to have the conveyance if the machinery is to pass by the conditional surrender? You must find an indication of intention to pass something by the conveyance which would not pass without it. The answer to that is that the conditional surrender and the conveyance are in the same form, and that the conveyance does not purport to pass any more machinery than passed by the

(1) 38 Ch. D. 128. (2) 38 Ch. D. 112.

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conditional surrender. If it did not pass by the conditional surrender, it did not pass by the contemporaneous deed. I find no difficulty in holding that there is no separate assignment of fixtures, or in holding that where there is a copyhold assurance capable by law of passing fixtures, and there is a contemporaneous conveyance of the copyholds purporting to pass those fixtures which might have passed if it had been a freehold conveyance, those fixtures will pass by the conveyance. Here there is no distinction whatever between the two instruments as regards the passing of the fixtures; they seem to me to be identical. The result, in my opinion, is that there is no indication here of an intention to pass anything separately. It appears to me that this case is, on principle—notwithstanding the differences which are to some extent incidental to a copyhold assurance, and which are accentuated by the form of this particular document—the same as *In re Yates* (1), and that that case must govern my decision in the present case.

Then comes a question as to these particular glazing rolls which were sold for £400. This is a question of fact upon which there is considerable difficulty; but there is also a point of law involved in it. The conveyance does not pass anything beyond what was in the building at the date of the mortgage. By the mortgage deed the mortgagor covenants that he will, during the continuance of the security, keep in good and substantial repair and good working order the mill, "machinery and fixtures comprised in and subject to this security." Now, if that had been the whole covenant, there would have been no difficulty; but the covenant adds these words: "and all buildings, machinery, fixtures and property which may from time to time be so comprised or subject"; and it is said that this implies a power for the mortgagor to take away any machinery or fixtures which may have become worn out, he exercising an honest discretion in the matter, provided, however, that he puts in other machinery of equal value. Probably the parties had in their thoughts at the time the mortgage was executed (though, of course, this is a mere guess) that from time to time new machinery and fixtures would be added or substituted, as is always the case in a large trading concern, and that by a memo-

(1) 38 Ch. D. 112.

randum or letter, without the necessity of a deed, the new property would be made subject to the security, and that the covenant would be treated as a comprehensive covenant covering all machinery that might come in from time to time. I cannot, however, come to the conclusion that there was a power of substitution vested in the mortgagor. The covenant covers, not only all present and future machinery and fixtures, but also all "buildings" which might from time to time be liable to the security; and, if the argument is worth anything, the mortgagor might take out any buildings. That, in my opinion, he clearly could not do. There is also this to be said, that the correspondence shews that the mortgagees were consulted, and that they did consent to a sale of this particular property, provided the proceeds were made available for reduction of the mortgage debt, and I do not think they assented in any other form.

But it is said that the proceeds were expended, together with other sums, in the purchase of "new plant and machinery," and that the mortgagees cannot insist upon that new plant and machinery being sold, and the proceeds applied towards payment of the mortgage debt. There was no distinct evidence as to what this "new plant and machinery" consisted of. "Plant" and "machinery" are two quite different things. There is no occasion specially to reserve the question, but, when the parties come to a sale, then, I think, it must be left open to those who represent the mortgagor to say that, to the extent of the substituted machinery, the mortgagees cannot take the proceeds of sale, by reason of that substituted machinery not being comprised in the security. Whether it is possible or not to distinguish between what machinery was substituted for old machinery and what was new additional machinery, is another question, which may have to be decided hereafter; but I decide now that the mortgagees are entitled to something out of the property when sold, and that they are entitled at once to have paid out to them the £400 arising from the sale of fixtures comprised in the security.

Solicitors: *S. Whitehead; Whitakers & Woolbert; Woodcock, Ryland, & Parker.*

G. I. F. C.

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May 30, 31.

GWYNNE *v.* DREWITT.

[1893 G. 1337.]

Statute—Completed Transaction thereunder—Repeal—Effect as to Revival of Public Rights—Highway—Turnpike—Closing Roads.

A turnpike Act—passed in 1819, and which was to continue in operation for twenty-one years—recited that a public bridleway across a farm would, if not stopped up, be the means of enabling persons to evade the tolls granted by the Act, and enacted that the bridleway should be vested in the owner of the farm in exchange for land of his taken for the purposes of the Act, and that, after the turnpike road had been opened for traffic, the bridleway should be stopped up, and it should be unlawful for the public to use it.

Subsequent statutes continued the operation of the Act till 1856, when it was repealed:—

Held, that the repeal did not revive the public right to use the bridleway.

J. E. A. GWYNNE was the owner, and in possession, of *Wootton Farm*, in the parishes of *Folkington* and *Jevington*, in the county of *Sussex*.

W. J. Drewitt and *J. Drewitt* claimed a right of way, in the parish of *Folkington*, across *Wootton Farm*, from a point on the boundary between the parishes of *Folkington* and *Wilmington*, running in a south-easterly direction, to a roadway leading into the high road from *Lewes* to *Polegate*—alleging that there was a common and public highway for all persons to go and return on foot at all times.

There had formerly been a bridleway across *Wootton Farm* in the direction above mentioned; but this was stopped up and discontinued under sect. 51 of the statute 59 Geo. 3, c. x. (Local) intituled, "An Act for more effectually making, straightening, repairing, and improving the road from near the town of *Lewes* to *Polegate*, in the parish of *Hailsham*, and from thence to *Eastbourne*, and from *Polegate* to *Hailsham Common*, in the county of *Sussex*."

Sect. 1 of this Act recited certain previous turnpike Acts; that the line of road thereby directed to be kept in repair was

circuitous and inconvenient; that it would be more advantageous for the public and for the inhabitants of the country adjacent that so much of the said line of road as was not comprehended in the new line of road thereafter mentioned should be abandoned; that a new turnpike road should be made between the points therein mentioned, and that it was expedient that a new Act should be passed for making and keeping in repair "the new turnpike road so proposed to be made as aforesaid, instead of the said present roads, and of such other roads adjacent or near thereto as are or shall become useless to the public by making the said intended new turnpike road"; and enacted that from the 25th of March, 1819, the recited Acts should be repealed, and the present Act should thenceforth commence and take effect for the purpose of making and keeping in repair the proposed new road.

Sect. 51 contained the following recital: "And whereas by the making of the new line of road hereinbefore described, several considerable parts hereinafter mentioned of the present turnpike road, and also several other roads hereinafter described, will become useless, and will, if not stopped up, be the means of enabling persons to evade the tolls hereby granted," and enacted that, immediately after the new turnpike road should be open for traffic and certified as therein mentioned, "the several highways following shall be stopped up, and the same are hereby declared to be stopped up and discontinued." Certain highways were then mentioned, including a bridleway which in part crossed *Wootton Farm* in the direction in which *W. J. Drewitt* and *J. Drewitt* claimed that there was an existing highway. The section further enacted that certain parts of the existing turnpike or highway, and also the above-mentioned portion of the bridleway, "shall be and are hereby declared to be vested in" the persons therein mentioned, such portion of the bridleway being vested in the Plaintiff's predecessor in title, "in exchange for his lands which are to be taken and used for the purposes of this Act." And the section declared that after such highways and bridleway had been stopped up and discontinued as aforesaid, it should not be lawful for any person or persons whomsoever (except as therein mentioned) "to use or claim the use of

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the same highways and bridleway, or any of them, as a highway, bridleway, or footway," a penalty of 40*s.* being imposed on any person unlawfully passing over the same on foot or otherwise.

Sect. 83 provided for the recovery of the penalties before justices of the peace, and for the application of such penalties.

Sect. 92 was as follows: "And be it further enacted, that this Act shall commence upon and have continuance from the said 25th day of March, 1819, for and during the term of twenty-one years, and from thence to the end of the then next session of Parliament."

In accordance with the Act, the new turnpike road was opened, and certain old ways, including the bridleway, were stopped up and discontinued.

The *Lewes, Eastbourne, and Hailsham Turnpike Road Act*, 1856 (19 & 20 Vict. c. xcvi.), after reciting that the term granted by the Act 59 Geo. 3, c. x., "and continued from time to time by divers Acts of Parliament for continuing certain turnpike Acts for limited periods," would expire on the 1st of November, 1856, and that it was expedient that such Act should be repealed, "and that further and more effectual powers should be granted in lieu thereof," enacted (sect. 1), that from and after the 1st of November, 1856, the Act of Geo. 3 "shall be and the same is hereby repealed, and that instead thereof this Act shall from thenceforth commence and be put in execution for the purposes and during the term hereinafter mentioned."

Sect. 9 provided that the Act of 1856 should be "put in execution for and during the term hereinafter mentioned," viz., twenty-one years, from the 1st of November, 1856, and to the end of the next following session of Parliament, "for the purpose of maintaining, improving, and keeping in repair the turnpike road from the southern end of the *South Street* of the parish of *St. Thomas-in-the-Cliff*, near the town of *Lewes* to *Polegate*, in the parish of *Hailsham*, and from thence to *Eastbourne*, and from *Polegate* to *Hailsham Common*, in the county of *Sussex*."

By sect. 4, all property vested in the trustees under the recited Act, or any other Act, was to be vested in the trustees of the Act of 1856.

Sects. 11–17 made provision for the taking of tolls in respect of the use of the turnpike road.

The turnpike road ultimately became a "main road" under sect. 13 of the *Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 Vict. c. 77).

Gwynne brought an action to restrain *W. J. Drewitt* and *J. Drewitt*, and each of them, from wrongfully entering upon or crossing over any part of the farm in assertion of any alleged right of way or otherwise.

The action was tried before Mr. Justice *Romer* on the 30th and 31st of May, 1894.

Neville, Q.C., and *Ingle Joyce*, for the Plaintiff:—

The repeal, by the Act of 1856, of the Act of 1819 did not, *per se*, render inoperative what had been done under the Act of 1819.

When an Act of Parliament is repealed the general rule is that it must be considered, except as to transactions closed, as if it had never existed: *Surtees* v. *Ellison* (1).

"This rule is recognised in sect. 38 of the *Interpretation Act*, 1889 (52 & 53 Vict. c. 63). In order to decide whether any particular transaction is affected by the repeal of an Act, it is necessary to ascertain whether the transaction in question was complete or incomplete at the time the Act was repealed. Thus, if an Act gives a right to do anything, the thing to be done, if only commenced, but not completed, before the Act is repealed, must upon the repeal of the Act be left in *statu quo*": *Hardcastle* on the Construction of Statute Law (2).

The closing of the bridleway, and the vesting of the freehold therein in the Plaintiff's predecessor in title, were transactions which were completed before the Act of 1819 was repealed, and the repeal could not revive the right of way.

Any dedication as a highway, prior to 1856, would have been unlawful, as being inconsistent with the Act of 1819.

Hopkinson, Q.C., and *Dale Hart*, for the Defendants:—

The Act of 1819 was passed to enable a turnpike road to be

(1) 9 B. & C. 750, 752.

(2) 2nd Ed. p. 392.

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made and maintained, and the Act shews that certain roads were stopped up to prevent people evading the payment of tolls. The effect of repealing the old Act was, that the public rights over the closed highways were revived. Tolls can no longer be demanded, and *cessante ratione legis, cessat ipsa lex.*

The Act of 1819 was only a temporary Act.

When an Act is repealed the law is as if it had never been passed: *Simpson* v. *Ready* (1).

ROMER, J.:—

I do not myself feel any doubt upon this point.

The Act of 1856, which repeals the Act of 1819, had not, in my judgment, the effect at all of reviving the old ways, which had been stopped up and discontinued. The effect of sect. 51 of the Act of 1819 is this—that the old ways there referred to were stopped up and discontinued—in my judgment, for ever. The true construction of the Act is, I think, that the soil of those ways was vested in the persons referred to in the section free from any public way whatever. The Act of 1819 contained a variety of provisions which had to be continued from time to time; and, accordingly, the Act was continued only for a term, under sect. 92; but the provision in sect. 51 was something which was done once for all, and was not intended to be undone at the expiration of the term referred to in sect. 92.

Now, when the Act of 1856 was passed, and the Act of 1819 repealed, it was not, in my judgment, at all the intention of the Legislature, or the effect of the Act of 1856, to undo that which had been already done during the continuance of the prior Act, or to revive these ways, which had been once for all discontinued and put an end to, as public ways, by sect. 51.

It follows that I must hear the evidence on both sides to see whether there has been a re-dedication since 1856.

Witnesses, on behalf of the Plaintiff and Defendants respectively, were then examined; and in the result his Lordship held that the Defendants had not established any re-dedication or

(1) 11 M. & W. 344, 346.

right of way. A declaration was accordingly made that there was no public way, and the Defendants were restrained from trespassing, and ordered to pay the costs of the action.

Solicitors for Plaintiff: *Rowcliffes, Rawle, & Co.*, agents for *Raper & Ellman, Battle.*

Solicitor for Defendants: *F. Hatton*, agent for *F. Lawson Lewis, Eastbourne.*

F. E.

VAUGHAN WILLIAMS, J.

1894

May 4, 28.

In re ANGLO-AUSTRIAN PRINTING AND PUBLISHING UNION.

[0120 of 1891.]

Company—Winding-up—Costs—Party and Party—Taxation—Misfeasance Summons—Official Receiver—Report on Evidence—Instructions for Brief—Third Counsel—Further Consultations—Refreshers—Companies Winding-up Rules, 1890, *r.* 78—*Order of* 17*th December*, 1891, *Table B, Part IV.—Rules of the Supreme Court*, 1883, *Order* LXV., *r.* 27, *sub-rr.* 30, 39, 40, 48; *Appendix N, Title*, "*Instructions*."

A report of the Official Receiver or a liquidator in support of a misfeasance summons is not on taxation to be treated as equivalent to a pleading or affidavit.

On the hearing of a misfeasance summons, adjourned into Court, and heard on oral evidence—as between party and party:—

(*a.*) The costs allowed for the Official Receiver's report were those generally given for drawing and copying a statement of facts.

(*b.*) The costs of instructions for brief were disallowed under the rules, but, *semble*, the rule ought to be altered so as to include such costs.

(*c.*) The fees and costs incidental to the employment of a third counsel were under the circumstances of the case allowed.

(*d.*) Refreshers to counsel were held to be within the discretion of the taxing officer.

(*e.*) Costs and fees of further consultations (beyond the first) were under the circumstances of the case disallowed.

THE *Anglo-Austrian Printing and Publishing Union, Limited*, was, on the 2nd of May, 1891, ordered to be wound up.

On the 21st of July, 1892, the Official Receiver and Liquidator took out a summons under sect. 10 of the *Companies (Winding-up) Act*, 1890, against *James T. Agg-Gardner*, Sir *H. Isaacs*, Sir *R. Lethbridge*, *C. Kegan Paul*, and *Horatio Bottomley*.

The summons was adjourned into Court, where the witnesses were examined orally, and was dismissed as against *Bottomley*.

On the 3rd of August, 1893, after the hearing of the summons had occupied several days, an order on the summons was made (by consent) by Mr. Justice *Vaughan Williams*, that *J. T. Agg-Gardner* should pay the Applicant a certain sum in discharge of all claims set forth in the summons, and that the costs of the Applicant of and consequent upon the application (except such costs as related only to the Respondents other than *J. T. Agg-*

Gardner) should be taxed and paid by *J. T. Agg-Gardner* to the Applicant.

By an order dated the 10th of February, 1894, Sir *Henry Isaacs*, Sir *Roper Lethbridge*, and *C. Kegan Paul* were ordered to pay certain sums claimed by the summons; and it was also ordered that they should jointly and severally pay the costs of the application (such costs to be taxed), except so far as the same had been increased by adding *Bottomley* as a Respondent, and excepting that the Applicant was to give credit for what he should have received from *J. T. Agg-Gardner* in respect of the costs directed to be taxed, and paid by him, under the Order of the 3rd of August, 1893.

The bill of costs of the Official Receiver and Liquidator (except such as related only to the Respondents other than *J. T. Agg-Gardner*) was carried in for taxation by Mr. Registrar *Hood*, and such bill included (*inter alia*) the following items:—

	£	s.	d.
1. "Instruction for special report of Official Receiver under rule 78 (of the Companies Winding-up Rules, 1890) involving perusals of all the correspondence (partly written in German, and many thousands of folios), the agreements (over fifty in number), depositions (1500 folios), and all other books and documents of the company, setting out the facts and information on which the Official Receiver intended to proceed, derived from the documents and correspondence of the company in his possession, and the depositions of the directors and others, and involving the arrangement and selection of those documents which were material to the case, and the rejection of a very large part of the correspondence and documents, amounting to thousands of folios, estimated to have taken clerk and self ninety-eight hours .	66	0	0
[Note.—All copies sent to counsel charged with briefs.]			

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		£	s.	d.
2. "Drawing report, folios	332			
Less folios, appendices	168			
Net folios .	164	8	4	0
3. "Copy draft report for printer (332 folios) .		5	10	8
4. "Instructions for brief on hearing, involving numerous attendances on the Official Receiver, the late secretary, and solicitor of the company, perusals of numerous documents, and the books of the company and the correspondence		52	10	0"

5. Certain items relating to the brief of the third counsel who appeared for the Official Receiver at the hearing of the summons, his fee, and the one set of observations, copies of documents, consultation fees and refreshers, incidental to the employment of such third counsel.

6. Several items relating to fees paid to counsel for consultations during the hearing of the summons, and beyond the first consultation fees—and also relating to attendances in connection with such further consultations.

7. Four refresher fees paid to each of the Applicant's counsel on the hearing of the summons.

The Registrar disallowed or reduced the amounts of the above items; and the objections taken by the Official Receiver and Liquidator against, and the Registrar's reasons for, the disallowance of the items, were as follows:—

Objections 1, 2, 3. "The Applicant objects to the disallowance of the items £66 and £5 10*s.* 8*d.*, and of the part disallowance of the item £8 4*s.*, on the grounds that the application under sect. 10 (whereunder this proceeding was brought) is in the nature of an action, and that, under rule 78 of the Companies Winding-up Rules, 1890, the Official Receiver may make a report, but any other person is to proceed by affidavit; that such

affidavit, evidence, or report is in the nature of and equivalent to a pleading in an action; that the same amount of careful drafting is required. That, as regards the amount charged for instructions, the preparation of the report involved minute and careful investigation, and perusal of several thousands of letters (a large number written in German and French), the perusal of a large number of books and documents formerly in the possession of the company and of *Horatio Bottomley*, and the mere investigation with the object of rejecting those of immateriality involved many hours' careful investigation."

Registrar's reasons for disallowance.

"Objections 1, 2, and 3 are to the principle upon which I have dealt with the report made by the Official Receiver to the Court under rule 78. The application is a summons in the winding-up, adjourned into Court, accompanied with 'a statement of facts,' which is called a report. I have dealt with it as a 'statement of facts,' and therefore allowed drawing at 8*d.* and copy at 4*d.* a folio respectively (see Appendix N of Rules of Supreme Court, 1883), and disallowed 'instructions.'"

Objection 4. "The Applicant objects to the disallowance of this item (£52 10*s.*) on the ground that the hearing of this summons is an original hearing, and in the nature of or equivalent to an action, involving large sums of money and difficult questions of law. As to the amount, the magnitude of the correspondence and documents and the length of time over which the transactions were carried, and the difficulty of obtaining the evidence from witnesses who were antagonistic to the Applicant, involved much labour and time, and the arrangement of the correspondence with a view to reducing the cost of copies also entailed considerable labour."

Registrar's reasons for disallowance.

"Objection 4, to the disallowance of instructions for brief. This application is not 'the hearing or trial of an action upon notice of trial or notice of judgment given'; therefore instructions for brief cannot be allowed. Such instructions are not even allowed on the hearing of an originating summons, on the same grounds (see Appendix N of Rules of Supreme Court, 1883,

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'Instructions'). I have allowed for drawing and copying all the necessary proofs and statements of the witnesses and observations at the rate of 1*s.* for drawing and 4*d.* for each copy for counsel."

Objection 5. "The Applicant objects to the disallowance of the fee paid to third counsel on the hearing of the summons; and the consequent disallowance of one set of the observations and copies of documents accompanying the brief, and consultation fees and refreshers, on the ground that, having consideration to the large sums of money involved, the commercial importance of the case, the legal points involved, and also the extent and number of the documents and accounts accompanying (over 12,000 folios), and to the probable duration of the trial, the Applicant could not, with ordinary prudence, have ventured into Court with less aid than that of three counsel."

Registrar's reasons for disallowance.

"Objection 5, to the disallowance of a third counsel. A discretionary item. A third counsel can, under very special circumstances, be allowed on the trial of an action, but has never been allowed on an adjourned summons as far as I can ascertain; and, as a general rule, 'it requires a very strong case to induce the Court to sanction the fees of more than two counsel on a taxation as between party and party' (*Malins*, V.-C., in *Smith* v *Buller* (1)). In *Pearce* v. *Lindsay* (2), *Turner*, L.J., said, 'It was not clearly shewn to have been essentially necessary for the purpose of doing justice between the parties at the hearing that three counsel should be employed.' *Pearson*, J., cited this case in *Le May* v. *Welch* (3). There are many other cases where a third counsel has been allowed or disallowed. In *Parish* v. *Poole* (4), the Judge supported the Taxing Master's discretion. *Kirkwood* v. *Webster* (5) lays down the principle on which three counsel can be allowed."

Objection 6. "The Applicant objects to the disallowance of the items for consultations. The trial of the action was continued from day to day for four days in June, and only one consultation fee has been allowed. For the reasons set opposite

(1) Law Rep. 19 Eq. 473.
(2) 1 D. F. & J. 573.
(3) W. N. (1885) 180.
(4) 34 W. R. 365.
(5) 9 Ch. D. 239.

the item preceding, the Applicant submits that as the trial proceeded it was proper and necessary that he should confer with his counsel thereon." [For Registrar's reasons, see *infra.*]

Objection 7. "The Applicant objects to the disallowance of the refresher fees to counsel on the ground that this was an original proceeding in the nature of an action, and of the magnitude and commercial importance before set forth."

Registrar's reasons for disallowance.

"Objections 6 and 7. This not being the trial of an action, consultations day by day and refreshers cannot be allowed, at all events as between party and party. No fresh issue was raised during the hearing of the summons, and the mere fact of it taking more than one day is no reason for having consultations day by day. I have no power to allow fees as 'refreshers' on a summons adjourned into Court; but I have, in the exercise of my discretion, allowed such fees on the brief as I think proper, looking at the necessary papers and the time taken in the hearing."

The Official Receiver and Liquidator took out a summons asking that his objections to the taxation might be allowed, and that it might be referred back to the Registrar to vary his certificate accordingly.

The summons was adjourned into Court and heard by Mr. Justice *Vaughan Williams* on the 4th of May, 1894.

Muir Mackenzie, in support of the summons:—

1 to 3. *As to the report.*—The costs disallowed under this heading should be allowed. The misfeasance summons was an action, and the report should have been dealt with as if it had been a report by a liquidator, supported by an affidavit, under the procedure prior to 1891. The costs of such an affidavit would have been allowed, and costs ought to be allowed on the same footing as if the report were either a pleading or an affidavit. The report is not a mere voluntary statement of facts; it is made under an Act and rules which have come into existence since the Rules of the Supreme Court, 1883. The scale set out in Appendix N to those rules provides for the costs of the particular

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items therein referred to, and "special allowances" may be made under Order LXV., rule 27. The only reason given for disallowing the item was because it was not expressly mentioned in the rules as to costs.

[VAUGHAN WILLIAMS, J.:—Rule 333 of the Bankruptcy Rules, 1886, says that the report of the Official Receiver under that rule shall be *primâ facie* evidence; but in bankruptcy no costs of such a report are allowed.]

Instructions for an affidavit would have been allowed. In bankruptcy there would have been no need to employ a solicitor.

[VAUGHAN WILLIAMS, J.:—It is not a question of employing a solicitor. The report is made for the assistance of the Court; and how can the Court order a litigant to pay for that?]

The Court will not enter into an inquiry whether the report was prepared by the Official Receiver or by some other person: *In re Bull* (1).

Sect. 10 of the *Companies (Winding-up) Act*, 1890, enables the Official Receiver to take proceedings in respect of a misfeasance, and rule 78 of 1890 says that "where the application is made by the Official Receiver or liquidator he may make a report to the Court stating any facts and information on which he proceeds which are verified by affidavit, or derived from sworn evidence in the matter. Where the application is made by any other person, it shall be supported by affidavit."

The report ought to be paid for as a pleading, or at any rate as an affidavit.

4. *As to instructions for brief.*—The Registrar's reason is insufficient. Item 81 of Appendix N to the Rules of 1883, on which he relies, is as follows: "Instructions for brief on hearing or trial of action upon notice of trial or notice for judgment given, whether such trial be before a judge, with or without a jury, or before an official or special referee, or on trial of an issue of fact before a judge, commissioner, or referee, or on assessment of damages."

A misfeasance summons is an originating summons, and is

(1) 2 Morrell, 59.

therefore an action: *Supreme Court of Judicature Act*, 1873, s. 100; *In re Fawsitt* (1).

An order made on such a summons is now, under the *Companies (Winding-up) Act*, 1893 (56 & 57 Vict. c. 58), a final judgment within sect. 4, sub-sect. 1 (*g*), of the *Bankruptcy Act*, 1883. As the Court fixed the day of hearing, no notice of trial was given.

5. *As to the fees and costs incidental to the employment of a third counsel.*—Regard must in each case be had to the circumstances, such as the amount of the money issue involved, and the commercial importance of the case: *London, Chatham, and Dover Railway Company* v. *South Eastern Railway Company* (2). In the present case a great number of documents had to be examined; the amount involved was very large, and the examination of the witnesses lasted several days.

6 and 7. *As to the consultations and refreshers.*—The fees and costs of these matters ought to have been allowed. The summons was a cause or matter within Order LXV., rule 27, sub-rule 48.

C. E. E. Jenkins, for the Respondent *Agg-Gardner*:—

1 to 3. *As to the report.*—The Official Receiver's objection is that the report is in the nature of a pleading, and sub-rules 39 and 40 of Order LXV., rule 27, preclude him from contending that the report is to be treated as an affidavit. The costs of the report cannot be allowed as between party and party. The report is not an affidavit, and it is only by inference from rule 78 of 1890 that it can be considered as evidence in support of the summons It is the duty of the Official Receiver, as an officer of the Court, to make the report, and litigants cannot be ordered to pay the costs of his solicitor performing the work. The power to order such costs to be paid rests on the Act and rules, and is not a matter of discretion: *Walker* v. *Crystal Palace District Gas Company* (3). Appendix N to the Rules of the Supreme Court, 1883, does not provide for the payment of such costs. The Registrar, as taxing officer, has no general authority to allow costs. Sub-rule 30 of Order LXV., rule 27, says that "as

(1) 30 Ch. D. 231. (2) 60 L. T. (N.S.) 753. (3) [1891] 2 Q. B. 300.

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to any work, and labour properly performed and not herein provided for, and in respect of which fees have heretofore been allowed, the same or similar fees are to be allowed for such work and labour as have heretofore been allowed"; but such a report as this is a novelty.

[*Muir Mackenzie* referred to the *Supreme Court of Judicature Act*, 1890 (53 & 54 Vict. c. 44), s. 5.]

That only says who is to pay costs. Order LXV., rule 8, and Appendix N therein mentioned do not extend to a report.

[VAUGHAN WILLIAMS, J., referred to the Order as to Fees of the 17th of December, 1891, Table B, Part IV. "Legal and other reasonable expenses of the Official Receiver, the amount disbursed:" *Palmer's* Winding-up Forms (1).]

That refers to the fees chargeable in the winding-up—not to costs between party and party.

4. *As to instructions for brief.*—The costs of this can only be allowed when notice of trial or of judgment is given: Appendix N, Title "Instructions."

5. *As to fees and costs caused by employing a third counsel.*—The Registrar can, as to these items, exercise his discretion, and the Court will not interfere.

6 and 7. *As to the consultations and refreshers.*—The same rule as to interfering with discretion applies in this case: *In re Harrison* (2); Order LXV., rule 27, sub-rule 48.

1894. May 28. VAUGHAN WILLIAMS, J.:—

In this case several objections have been taken to the Registrar's taxation.

As to objections 1, 2, and 3, I think that the Registrar rightly refused to treat the report as a pleading, or equivalent to a pleading. The report, of course, is not an affidavit, and does not come within Order LXV., rule 27. I think that the Registrar rightly disallowed the items for instructions.

The next matter to be dealt with is objection 4. I say, as to that, that I think the Registrar was right, for the reasons which he has given; but I think that the rule ought to be altered

(1) 2nd Ed. p. 745. (2) 33 Ch. D. 52.

so as to include instructions for brief on a summons for misfeasance under sect. 10 of the *Companies (Winding-up) Act*, 1890.

As to objection 5, I say that, having regard to the issues raised, and the probable length and actual length of hearing, I think it was essential to justice that three counsel should be allowed.

As regards objections 6 and 7, I think the Registrar was right in disallowing the consultations. He seems, notwithstanding the first three lines of his reasons, to have exercised his discretion, and I think he exercised it rightly.

As to the refreshers, I think he might have allowed them if he had thought it right to do so, for I think that the summons adjourned for hearing, on oral evidence, into Court, was a matter within Order LXV., rule 27, sub-rule 48, and sect. 100 of the *Judicature Act*, 1873. I do not mean to say that the Registrar should have allowed the refreshers at all; but I think it is more proper that he should exercise his discretion as to that—so that the matter must go back to him on this point. But it must be distinctly understood that I do not express any opinion that the refreshers ought to be allowed.

All that I say is, that I think there is the power to allow them in this case if the Registrar thinks it right to do so—the proceeding being a "matter."

C. E. E. Jenkins:—

When the point as to refreshers goes back to the Registrar, it should be open to him to review the fees which he has allowed on the brief.

VAUGHAN WILLIAMS, J.:—

Certainly I intended that, because it is quite obvious that the Registrar allowed larger fees on the brief than he otherwise would have done, because he thought he had no power to allow refreshers. That is one of the reasons which has led me to the conclusion that I ought not to deal with the question whether refreshers ought to be allowed, but send it back to the Registrar.

Solicitors for Applicant: *Gush, Phillips, Walters, & Williams.*
Solicitors for Respondent: *Maddisons.*

F. E.

VAUGHAN WILLIAMS, J.

1894
May 11.

In re HAMPSHIRE LAND COMPANY.

[0023 of 1893.]

Company—Winding-up—Supervision—Additional Liquidator—Appointment by Court—Security—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 150.

Where, in a winding-up under the supervision of the Court, an additional liquidator is appointed by the Court, he will be required to give security, though no security has been given by the voluntary liquidator.

In re Private Investors' Association (1) followed.

In re European Bank (2) not followed.

THE *Hampshire Land Company, Limited,* was incorporated in February, 1871. On the 30th of January, 1893, the shareholders passed an extraordinary resolution for voluntary winding-up, and appointing *J. J. Saffery* the liquidator in such winding-up; and on the 20th of February, 1893, an order was made by Mr. Justice *Vaughan Williams* continuing the voluntary winding-up under the supervision of the Court. This order was made on the petition of *W. Edmonds* and *W. F. J. Hunt,* the liquidators in the winding-up of the *Portsea Island Building Society.*

The society was being wound up under the supervision of the County Court of *Hampshire* (*Portsmouth*), and the society was the only creditor of the company, which owed the society over £30,000, and was itself insolvent.

By the *Portsea Island Building Society Act,* 1893, the whole of the proceedings in the winding-up of the society were transferred to the jurisdiction of the arbitrator to be appointed thereunder, and the Right Honourable Lord *Macnaghten* was afterwards appointed the arbitrator.

In further pursuance of such Act, a committee of inspection was appointed by the arbitrator.

On an application by the liquidators of the society and the committee of inspection to the arbitrator for directions, Lord *Macnaghten* made an order directing such liquidators to apply to the High Court, in the winding-up of the company, that *Edmonds* might be appointed joint liquidator of the company in connection with *Saffery.*

(1) *Palmer's* Winding-up Forms, 2nd Ed. p. 624. (2) 19 W. R. 268.

On the 15th of April, 1894, the application was made, and Mr. Justice *Vaughan Williams* made the order asked for.

On the drawing up of the order a question was raised in chambers whether *Edmonds* ought to be required to give security to account for what he should receive or become liable to pay as joint liquidator of the company, it being pointed out that no security had been required from *Saffery*.

On the 11th of May, 1894, the question was brought before Mr. Justice *Vaughan Williams* in Court. The solicitors for *Saffery* raised no objection to *Edmonds* being appointed without giving security.

Frank Evans, for the society :—

Where the shareholders have not required the voluntary liquidator to give security, and, after a supervision order has been made, the Court substitutes another person as liquidator, it is not the practice to order the substituted liquidator to give security: *In re European Bank* (1). Sect. 150 of the *Companies Act*, 1862, says that any "additional liquidators" appointed by the Court, after a supervision order "shall have the same powers, be subject to the same obligations, and in all respects stand in the same position as if they had been appointed by the company." The object in dispensing with security is to avoid expense.

VAUGHAN WILLIAMS, J.:—

The more recent practice has been to require security to be given. The form of an order made on the 4th of March, 1892, in *In re Private Investors' Association*, set out in *Palmer's* Winding-up Forms (2), directs the liquidator to "give security, to be approved by the Judge."

I see no reason for departing from this practice, and the additional liquidator must therefore give security in the usual way.

Solicitors for the Applicants: *Learoyd, James, & Mellor.*

Solicitors for the liquidator of the company: *Munns & Longden.*

(1) 19 W. R. 268. (2) 2nd Ed. p. 624.

F. E.

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Liability of Advanced Members to pay up forthwith the whole Balance Due.] It is competent for the members of a building society by an instrument of dissolution under sect. 32 of the Building Societies Act, 1874, to vary the rights of members under the rules by a provision in the instrument that members who have given notice of withdrawal shall have no preference or priority over members who have not given such notice.—Upon such an instrument taking effect it was held that advanced members could be compelled to pay up forthwith the balances due from them on their securities. KEMP *v.* WRIGHT - 462

2. —— *Unincorporated Society—Winding-up —Insolvency—Ordinary Creditors and Depositors —Liability of Advanced and Unadvanced Members —Costs of Realization—Costs of Winding-up.*] The liability of members of a building society (registered under the Building Societies Act, 1836, 6 & 7 Will. 4, c. 32) for its ordinary debts—such as rent, rates and taxes—does not depend on the doctrine of partnership, or on the contract of the members inter se, but on the doctrine of principal and agent; and if the assets are insufficient, the members, both advanced and unadvanced, are liable as contributories for such ordinary debts, if incurred while they are members.—But a rule purporting to empower the directors of such a society to borrow on deposit so as to bind not only its assets, but also its members personally, is ultrà vires to that extent, and in respect of such loans the members, advanced or unadvanced, are only under a liability which is limited to the amounts payable by them under the rules.—A building society (registered under 6 & 7 Will. 4, c. 32) had lent money to its advanced members in respect of their shares in the society. Some of the mortgages by the advanced members secured the principal advanced, and such sums as might become payable to the society under the mortgage, or the rules or bye-laws, or "in any other way." The other mortgages secured the mortgagor's instalments, subscriptions, fines, and other sums payable according to the rules.—The rules provided for the release of a member's security on his paying the amount due for principal, interest, fines, and other payments; and empowered the trustees, for the purposes of the society, to borrow sums up to a certain limit, at interest, and in order to procure such loans, to give their personal security, with a right to be indemnified out of the first funds of the society which should be received; but neither the rules nor the deposit receipts given under them purported to give any security to the depositors upon the funds or assets of the society.—The shares of both advanced and unadvanced members were of the same nominal value.—The assets of the society, when it was ordered to be wound up, were sufficient to pay the ordinary creditors, but not the depositors also, in full:—*Held*, that the actual costs of realizing the properties as they existed at the commencement of the winding-up must first be paid out of the assets as they then existed, and that the rest of such assets must be applied in paying ordinary debts and loans on deposits, pro ratâ; that to meet the estimated

BUILDING SOCIETY—*continued.*
costs of winding-up (other than costs of realization) a call must be made on all the members, both advanced and unadvanced, in proportion to their shares; that the deficiency due to the ordinary creditors must also be met by calls on all the members:—*Held*, however, that neither advanced nor unadvanced members were liable to contribute, beyond the amounts payable on their shares under the rules and tables, to pay the deficiency due to the depositors; and that the advanced members were entitled to redeem on paying the calls above mentioned and the amounts due under their mortgages and the rules and tables. *In re* WEST LONDON AND GENERAL PERMANENT BENEFIT BUILDING SOCIETY - 352

CAPITAL—Payment of dividends out of—Lost capital - - - - 239
See COMPANY. 5.

CASES—*Alexander Pirie & Sons* v. *Goodall* ([1892] 1 Ch. 35) explained - 115
See TRADE-MARK. 1.

—— *Aulain, Ex parte* (42 Ch. D. 1) distinguished
See COMPANY. 7. [474

—— *Barrow* v. *Barrow* (4 K & J. 409) followed
See SETTLEMENT. 2. [421

—— *Carpenter, In re* (7 Morrell, 270) followed
See BANKRUPTCY. 2. [557

—— *Cook, Ex parte* (2 P. Wms. 500) considered
See BANKRUPTCY. 2. [557

—— *Crossley* v. *Maycock* (Law Rep. 18 Eq. 180) followed - - - - 332
See VENDOR AND PURCHASER. 2.

—— *Daveron, In re* ([1893] 3 Ch. 421) considered - - - - 310
See WILL. 5.

—— *Dowse* v. *Gorton* ([1891] A. C. 190) followed
See EXECUTOR. [600

—— *European Bank, In re* (19 W. R. 268) followed - - - - 632
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—— *Fothergill* v. *Rowland* (Law Rep. 17 Eq. 132) considered - - - 147
See LANDLORD AND TENANT.

—— *Gibbins* v. *Board of Management of North-Eastern Metropolitan Asylum District* (11 Beav. 1) distinguished - 332
See VENDOR AND PURCHASER. 2.

—— *Goodier* v. *Edmunds* ([1893] 3 Ch. 455) considered - - - - 310
See WILL. 5.

—— *Harbin* v. *Masterman* (12 Eq. 559) affirmed
See ACCUMULATIONS. [184

—— *Harter* v. *Colman* (19 Ch. D. 630) distinguished - - - - 328
See MORTGAGE. 2.

—— *Head, In re* ([1893] 3 Ch. 426) distinguished - - - - 236
See PARTNERSHIP. 1.

—— *Hodson* v. *Tea Company* (14 Ch. D. 859) approved - - - - 547
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—— *Jennings* v. *Jordan* (6 App. Cas. 698) distinguished - - - - 328
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—— *Molyneux & White, In re* (13 L. R. Ir. 382; 15 L. R. Ir. 383) explained - 101
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—— *Oakeley* v. *Pasheller* (4 Cl. & F. 207) approved - - - - 32
See PRINCIPAL AND SURETY.

—— *Peake's Settled Estates, In re* ([1893] 3 Ch. 430) considered - - - 297
See SETTLEMENT. 3.

—— *Porter* v. *Lopes* (7 Ch. D. 358) distinguished
See PRACTICE. 3. [541

—— *Private Investors' Association, In re* (Palmer's Winding-up Forms, 2nd Ed. p. 624) followed - - - 632
See COMPANY. 12.

—— *Roberts, In re* (30 Ch. D. 234) distinguished
See WILL. 3. [276

—— *Sargant* v. *Read* (1 Ch. D. 600) distinguished
See PRACTICE. 3. [541

—— *Silver Valley Mines, In re* (18 Ch. D. 472) not followed - - - 344
See COMPANY. 11.

—— *Skeats' Settlement, In re* (42 Ch. D. 522) followed - - - - 297
See SETTLEMENT. 3.

—— *Small* v. *National Provincial Bank of England* ([1894] 1 Ch. 686) followed 600
See EXECUTOR.

—— *Stewart* v. *Jones* (3 De G. & J. 532) distinguished - - - - 276
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—— *Swire* v. *Redman* (1 Q. B. D. 536) considered - - - - 32
See PRINCIPAL AND SURETY.

—— *Tanqueray-Willaume and Landau, In re* (20 Ch. D. 465) distinguished - 101
See VENDOR AND PURCHASER. 3.

—— *Tweedale* v. *Tweedale* (23 Beav. 341) followed - - - - 328
See MORTGAGE. 2.

—— *Vint* v. *Padget* (2 De G. & J. 611) followed
See MORTGAGE. 2. [328

—— *Whistler, In re* (35 Ch. D. 561) followed
See VENDOR AND PURCHASER. 3. [101

—— *White* v. *Hillacre* (3 Y. & C. (Ex.) 597) distinguished - - - - 328
See MORTGAGE. 2.

—— *Wilder* v. *Pigott* (22 Ch. D. 263) followed
See SETTLEMENT. 2. [421

—— *Yates, In re* (38 Ch. D. 112) followed 600
See EXECUTOR.

CHARITY—*Mortmain—Mortmain Act* (9 *Geo.* 2, *c.* 36), *s.* 3—*Corporation Debenture Stock—Charge on Rents.*] Corporation debenture stock charged on "the revenue of all landed and other property of the corporation":—*Held*, not to be an interest in land within the Mortmain Act (9 Geo. 2, c. 36), s. 3. *In re* PICKARD. EMMSLEY *v.* MITCHELL - - - - - 88

CHARITY—*continued.*

—— Gift to—Void accumulations—Thellusson Act - - - - - - 184
See ACCUMULATIONS.

COMPANY — *Debenture — Floating Security — Equitable Charge—Winding-up—Uncalled Capital—Foreclosure—Form of Judgment.*] A debenture of a limited company, in the usual form of a floating security charging all the property of the company, both present and future, including its uncalled capital, confers upon the registered holder, in the event of the debenture becoming immediately payable in consequence of a winding-up, the ordinary mortgagee's remedy by foreclosure against the uncalled capital as well as the other property comprised in the security.—Form of foreclosure judgment on a mortgage debenture. SADLER *v.* WORLEY - - 170

2. —— *Debenture—Floating Security—Covenant for Payment on Specified Day—Winding up of Company before such Day.*] Where a debenture, issued by a company by way of floating security, contains a covenant for payment of the principal money on a specified day, though without any stipulation making the money immediately payable in the event of a winding-up, the occurrence of a winding-up before the specified day renders the money immediately payable, and entitles the debenture-holder at once to realize his security for the full amount of principal, interest and costs.—*Hodson* v. *Tea Company* (14 Ch. D. 859) approved of.—Judgment of Kekewich, J., varied. WALLACE *v.* UNIVERSAL AUTOMATIC MACHINES COMPANY - - - - - C. A. 547

3. —— *Debenture-holders' Action—Receiver—Order for Receiver to borrow Money as a First Charge to preserve the Property—Rules of the Supreme Court*, 1883, *Order XVI., r.* 9.] In an action by a debenture-holder on behalf of himself and all other debenture-holders, the Court will, in a case of emergency, empower the receiver to borrow money as a first charge on the undertaking, in priority to the debentures, for the preservation of the property. GREENWOOD *v.* ALGESIRAS (GIBRALTAR) RAILWAY COMPANY. THE SAME *v.* THE SAME - - - C. A. 205

4. —— *Director — Qualification — Implied Agreement to take Shares—Allotment—Registration — Allotment Sheets — Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 25.] The articles of a company provided that the first directors should be allowed one month from the first general allotment of shares in which to acquire their qualification; that the office of director, in the case of a first director, should be vacated if he failed to get the shares within the prescribed period, or if he sent in a written resignation.—C. signed the memorandum of association for one share, and was appointed a first director. He attended several meetings, but never applied for his qualification shares At the first general allotment however, without his knowledge, the requisite number of shares were allotted to him, and his name was placed on an allotment sheet which was kept as a temporary list of members and was signed by the chairman and secretary, but did not contain all the particulars required by the 25th section of the Companies Act, 1862. C. occasionally attended meetings before the expiration of a month from the first allotment of shares, but none afterwards. Shortly after the expiration of the month, the secretary requested C. to sign an application for the shares; but he refused to do so, and tendered his resignation of the office of director. After his resignation his name was transferred from the allotment sheet to the formal register of shareholders. The company was not in liquidation On an application by C. to have his name removed from the register in respect of these shares:—*Held* (affirming the decision of Stirling, J.), that there was no constructive agreement on his part to take the shares; that the entry in the allotment sheet was not under the circumstances of the case a registration within the meaning of the Companies Acts; and that the directors had no authority to put his name on the register after his resignation. His application was therefore allowed.—*Semble*, that if the allotment sheets had been intended by the directors as a register of shares within the Act, and had been so treated by them, the mere informality of the entry in some particulars would not have made the registration invalid. *In re* PRINTING TELEGRAPH AND CONSTRUCTION COMPANY OF THE AGENCE HAVAS. *Ex parte* CAMMELL [C. A. 392

5. —— *Dividends—Payment of Dividend out of Capital—Lost Capital.*] A limited company was formed the objects of which were to invest its capital in stocks, funds, shares, and securities of various descriptions, and the receipts of the company from the income of these investments were made applicable to paying a dividend. The market price of some of the investments of the company fell, and others of them proved worthless, so that the value of the company's assets was materially diminished; but the income received from the investments for the year considerably exceeded the expenses of the year. One of the trustees of the company brought an action on behalf of himself and all the other stockholders in the company, except the Defendants, against the company and the other trustees to restrain the company from declaring a dividend, on the ground that until the loss of capital was made up a payment of dividend would be a payment out of capital:—*Held* (by Stirling, J., and by the Court of Appeal), that it was within the power of the company to declare a dividend, for that there is no law to prevent a company from sinking its capital in the purchase of a property producing income and dividing that income without making provision for keeping up the value of the capital; and that fixed capital may be sunk and lost, and yet the excess of current receipts over current expenses may be applied in payment of a dividend; though where the income of a company arises from the turning over of circulating capital no dividend can be paid unless the circulating capital is kept up to its original value, as otherwise there would be a payment of dividend out of capital. VERNER *v.* GENERAL AND COMMERCIAL INVESTMENT TRUST [C. A. 239

6. —— *Practice—Scheme of Arrangement—Appeal by Persons not Parties—Leave to Appeal—Joint Stock Companies Arrangement Act*, 1870

COMPANY—*continued.*

(33 & 34 *Vict. c.* 104)—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 124.] A judge having made an order sanctioning an arrangement under the Joint Stock Companies Arrangement Act, 1870, an appeal was presented by persons whose interests as creditors were affected by the scheme, but who had not opposed the scheme at the meeting of creditors, nor appeared before the Judge when his sanction was applied for, nor obtained leave to appeal:—*Held*, that the right of appeal under the Act is governed by the Companies Act, 1862, s. 124, which gives a right of appeal subject to the same conditions as appeals from decisions in the ordinary jurisdiction of the Court; and that, as according to the practice of the Court of Chancery a person not a party to the proceedings could not appeal from an order without the leave of the Court, the present appeal must be dismissed, the Appellants not having obtained leave, and the case not being one in which the Court thought that leave ought to be given. *In re* Securities Insurance Company - C. A. 410

7. —— *Shares—Underwriting Agreement—Winding-up—Contributory.*] The Applicants, by an underwriting letter, agreed with the vendor to a company, in consideration of a commission, at any time within three months, "if and when called upon" by him, "to subscribe or find responsible subscribers for" a certain number of shares in the company, to be proportionally reduced in case the shares were partially subscribed for by the public. The agreement authorized the vendor, in the event of any underwriter "not subscribing or finding responsible subscribers as above mentioned," to subscribe for the shares in the underwriter's name, and to authorize the directors to allot the shares and register the underwriter's name in respect thereof:—*Held*, that a request to the underwriters to subscribe or find responsible subscribers was a condition precedent to their being under liability to be treated as shareholders, and that as no such request had been made their names must be removed from the list of contributories in the winding-up of the company. *Ex parte Audain* (42 Ch. D. 1) distinguished. *In re* Harvey's Oyster Company. Ormerod's Case - - - - 474

8. —— *Winding-up—Abuse of Process—Demurrable Petition—Restraining Advertisement of Petition—Staying Proceedings—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 85—*Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 40.] Where a petition against a company is presented ostensibly for a winding-up order, but really for another purpose, such as putting pressure on a company, the Court has an inherent jurisdiction to prevent such an abuse of process, and will do so, without requiring an action to be commenced, by restraining the advertisement of the petition, and staying all proceedings upon it. *In re* A Company - 349

9. —— *Winding-up—Contributory—Director—Consent to act as Director—Qualification Shares—Resignation of Office.*] R. was named in the articles of association of a company, and in a prospectus issued by it, as one of its first directors. The articles provided that a director's qualification should be the holding of shares of the nominal amount of £250; and that the first directors might act before acquiring their qualification: but that, unless they did so within a month of their appointment, they should "be deemed to have agreed to take the same." R., although not one of the original seven members of the company, signed and sent to the company prints of the prospectus and articles. He never acted as a director, nor paid for qualification shares; but more than a month after the company's incorporation he wrote a letter to the secretary resigning his office and referring to his "having consented to join the board":—*Held*, by the Court of Appeal (affirming Wright, J.), that, in the winding-up of the company, R. was rightly placed on the list of contributories in respect of shares of the nominal value of £250. *In re* Hercynia Copper Company - - - - - C. A. 403

10. —— *Winding-up—Costs—Party and Party—Taxation—Misfeasance Summons—Official Receiver—Report on Evidence—Instructions for Brief—Third Counsel—Further Consultations—Refreshers—Companies Winding-Up Rules*, 1890, *r.* 78—*Order of* 17*th December*, 1891, *Table B, Part IV.—Rules of the Supreme Court*, 1883, *Order* LXV., *r.* 27, *sub-rr.* 30, 39, 40, 48; *Appendix N, Title*, "*Instructions.*"] A report of the Official Receiver or a liquidator in support of a misfeasance summons is not on taxation to be treated as equivalent to a pleading or affidavit.—On the hearing of a misfeasance summons, adjourned into Court, and heard on oral evidence—as between party and party:—(*a.*) The costs allowed for the Official Receiver's report were those generally given for drawing and copying a statement of facts.—(*b.*) The costs of instructions for brief were disallowed under the rules, but, *semble*, the rule ought to be altered so as to include such costs.—(*c.*) The fees and costs incidental to the employment of a third counsel were under the circumstances of the case allowed.—(*d.*) Refreshers to counsel were held to be within the discretion of the taxing officer.—(*e.*) Costs and fees of further consultations (beyond the first) were under the circumstances of the case disallowed. *In re* Anglo-Austrian Printing and Publishing Union - - 622

11. —— *Winding-up—Stannaries Court—Jurisdiction—Company "formed for working Mines within the Stannaries"—Voluntary Liquidation—Transfer of Application—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 81, 141—*Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *ss.* 1 (*sub-ss.* 1, 2, 4), 3, 32.] Where a company is formed for working mines within the Stannaries "or elsewhere in England," but is not shown to be actually working mines beyond the limits of the Stannaries, the Court having jurisdiction to wind it up, or to entertain an application in its voluntary winding-up, is the Stannaries Court: and where an application in the voluntary winding-up has been made to that Court, the High Court will not exercise its power to retain subsequent applications before itself, but will transfer them to the Stannaries Court:—*Semble*, that, having regard to the repeal of sect. 81 of the Companies Act, 1862, and to sect. 1 of the Com-

COMPANY—*continued.*

panies (Winding-up) Act, 1890, *In re Silver Valley Mines* (18 Ch. D 472) is no longer law. *In re* NEW TERRAS TIN MINING COMPANY 344

12. —— *Winding-up—Supervision—Additional Liquidator—Appointment by Court—Security—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 150.] Where, in a winding-up under the supervision of the Court, an additional liquidator is appointed by the Court, he will be required to give security, though no security has been given by the voluntary liquidator—*In re Private Investors' Association* (Palmer's Winding-up Forms, 2nd Ed. p. 624) followed.—*In re European Bank* (19 W. R. 268) not followed. *In re* HAMPSHIRE LAND COMPANY - - 632

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CONDITIONS OF SALE—Time of completion—Wilful default - - - 524
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CONSOLIDATION OF MORTGAGES 321, 328
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CONTRACT—By letters - - - 332
See VENDOR AND PURCHASER. 2.

—— Restraint of trade - - - 377
See RESTRAINT OF TRADE.

CONTRIBUTORY—Winding-up - 403, 474
See COMPANY. 7, 9.

COPYRIGHT—*Paintings—Fine Arts Copyright Act*, 1862 (25 & 26 *Vict. c.* 68)—*Tableaux Vivants.*] *Held*, by the Court of Appeal, affirming the decision of Stirling, J., that the representation of a picture by a tableaux vivant, formed by grouping in the same way as the figures in the picture living persons dressed in the same way and placed in the same attitudes as the figures in the picture, is not an infringement of copyright in the picture. HANFSTAENGL *v.* EMPIRE PALACE [C. A. 1

COSTS—Enforcing payment—Sequestration 271
See PRACTICE. 2.

—— Winding-up—Building society - 352
See BUILDING SOCIETY. 2.

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See COMPANY. 10.

COUNSEL'S FEES—Taxation of costs—Winding up of company—Instructions—Refreshers - - - - 622
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COVENANT—Restrictive—Sale of corporate property—Consent of Local Government Board - - - - 208
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—— Debenture-holders' action—Sale of undertaking - - - - 286
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DIVIDEND—Payment out of capital - 239
See COMPANY. 5.

EASEMENT—*Access of Air—Grant of Land for Specific Purpose—Derogation from Grant—Injunction—Parol License—Revocation without Notice—Damages.*] Under a grant of land expressed in general terms, and not made for any specific purpose, the grantee will not acquire a right by way of easement to the access of air, except where such right is enjoyed through a definite aperture in the nature of a window on the property granted, or through a definite channel over adjoining property; but the grantor of land to be used for a particular purpose is under an obligation to abstain from doing anything on adjoining property belonging to him which would prevent the land granted from being used for the purpose for which the grant was made.—Where, therefore, a lease was granted in order that the land demised might be used by the lessee for the purpose of carrying on the business of a timber merchant, and the lessee covenanted to carry on such business:—*Held*, that the assigns of the lessor were not entitled to build upon adjoining property acquired by them from him, so as to interrupt the access of air to sheds upon the demised property used for drying timber, so as to interfere with the carrying on of the business in ordinary course.—The lessee, after the date of the lease, with the lessor's permission, but at his own cost, constructed certain ventilators in the walls of a building demised by the lease. The lessee gave no consideration for such permission, and no deed was executed giving him the right to use the ventilators. The ventilators were obstructed by buildings erected upon adjoining property by assigns of the lessor:—*Held*, that the license being revocable, the lessee was not entitled to an injunction; but that, in the absence of reasonable notice of revocation, he was entitled to an inquiry as to damages in respect of the ventilators having been obstructed without such notice. ALDIN *v.* LATIMER CLARK, MUIRHEAD & CO. - - - - - - 437

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—— Support—Mines under railway - 157
See MINE.

ENGINEER—Appointed as arbitrator—Unfairness - - - - - 478
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EVIDENCE—Threats of patent action—Damages
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—— To explain will—Ambiguity - - 83
See WILL. 4.

EXECUTOR—*Trader—Business carried on by Executor—Administration—Receiver and Manager—Debts incurred by Executor—Indemnity—Rights of Creditors of Testator and subsequent Creditors of Executor—Trade Machinery—Mortgage—Conveyance of Land mentioning Fixtures—Bill of Sale.*] The principle of *Dowse* v. *Gorton* ([1891] A. C. 190)—that an executor carrying on a testator's business with the assent, either express or implied, of the testator's creditors is entitled (in priority to the testator's creditors) to be indemnified out of the estate against the liabilities properly incurred by him in carrying on the business—is applicable where a receiver and manager has been appointed in an administration action to carry on the business in succession to the executor, and whether the will does or does not contain a power to carry on the business.—The principle of *In re Yates* (38 Ch. D. 112)—under which a conveyance of land and buildings used for a business passes the fixed trade machinery on the premises, though not expressly mentioned, and therefore is not a bill of sale of the machinery—applies equally where the conveyance expressly mentions the fixed trade machinery, either by reference to a schedule or otherwise.—*Small* v. *National Provincial Bank of England* ([1894] 1 Ch. 686) considered. *In re* BROOKE. BROOKE *v.* BROOKE - - 600

—— Sale of leaseholds—Lapse of twenty years
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FORECLOSURE—Debenture—Form of judgment
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FRAUDS, STATUTE OF (29 *Car.* 2, *c.* 3), *ss.* 7, 8—*Creation or Declaration of Trust of Lands—Assignment of Leasehold by Wife to Husband for Limited Purpose—Intention to re-assign—Assignment absolute in form—Admission of Parol Evidence.*] By an indenture dated in 1890 the Duchess of M., in consideration of natural love and affection, assigned to her husband the Duke a leasehold house belonging to her. The deed was in form an absolute assignment. The Duke subsequently mortgaged the house for the purpose of raising money to pay his debts. The Duchess joined with the Duke in covenanting to pay the mortgage debt, but the equity of redemption was reserved to the Duke alone. Upon the death of the Duke in 1892, the Duchess claimed to be entitled to the house subject to the mortgage. There was evidence that she had assigned the house to the Duke solely to enable him to mortgage it in his own name, and that it was part of the arrangement between them that he should

FRAUDS, STATUTE OF—*continued.*

re-assign to her, which, if he had lived, he would have done:—*Held*, that the case fell within the authorities which forbid the Statute of Frauds to be used to cover what would amount to a fraud, and consequently that the statute could not be successfully pleaded in opposition to the claim of the Duchess *In re* DUKE OF MARLBOROUGH. DAVIS *v.* WHITEHEAD - - 133

2. —— *Vendor and Purchaser—Memorandum in writing—Purchaser's Name filled in by Auctioneer's Clerk.*] At a sale of real estate by public auction, a lot was knocked down to A. as the highest bidder, and A., at the request of the auctioneer's clerk, who was acting under the direction of the auctioneer, gave his name and address as the purchaser, and stood by while the clerk filled in his name and address in the memorandum in the usual way, but did not otherwise sign the memorandum:—*Held*, that there was a sufficient signature by or on behalf of A. within the Statute of Frauds. SIMS *v.* LANDRAY 318

GRANT—Derogation from - - - 437
See EASEMENT.

HIGHWAY—*Conveyance of adjoining Land—Presumption as to Soil ad medium filum viæ—Rebuttal of Presumption.*] In a conveyance by the Defendant to the Plaintiff, a wood which abutted on a highway called Coldhall Lane was described by its acreage, which was given with great minuteness, and by reference to a map which did not include any part of the lane. The property was also described in a schedule to the deed, by reference to the numbers in the ordnance map, in which the wood and the lane were marked with different numbers. By the recitals in the deed it was stated that it was one of the conditions of the contract for sale that the trees on the land sold should be paid for as part of the consideration at a valuation, and that such valuation had been made and the amount paid by the Plaintiff. The lane was very little used as a highway, being a grassy lane with trees and underwood on the side adjoining the wood: but evidence was given shewing that none of these trees were included in the valuation:—*Held* (affirming the decision of Romer, J.), that evidence of the trees being omitted from the valuation was properly admissible as proof of the circumstances under which the conveyance was executed; and that the fact of such omission, coupled with the fact that the lane was not included in the measurement or the map, was sufficient to rebut the presumption that the soil of the lane, ad medium filum viæ passed by the conveyance. PRYOR *v.* PETRE C. A. 11

2. —— *Revival of Public Right—Statute—Completed Transaction thereunder—Repeal—Turnpike—Closing Roads.*] A turnpike Act—passed in 1819, and which was to continue in operation for twenty-one years—recited that a public bridleway across a farm would, if not stopped up, be the means of enabling persons to evade the tolls granted by the Act, and enacted that the bridleway should be vested in the owner of the farm in exchange for land of his taken for the purposes of the Act, and that, after the turn-

HIGHWAY—*continued.*
pike road had been opened for traffic, the bridleway should be stopped up, and it should be unlawful for the public to use it.—Subsequent statutes continued the operation of the Act till 1856, when it was repealed:—*Held*, that the repeal did not revive the public right to use the bridleway. GWYNNE *v.* DREWITT - - 616

HUSBAND AND WIFE—Settlement by infant
See SETTLEMENT. 2. [421

ILLEGITIMATE CHILD—Construction of will—Niece - - - - 83
See WILL. 4.

—— En ventre sa mère—Settlement - 573
See SETTLEMENT. 1.

INDEMNITY—Executor carrying on business of testator - - - - - 600
See EXECUTOR.

—— Retiring partner—Surety - - 32
See PRINCIPAL AND SURETY.

INFANT—Settlement—Married woman - 421
See SETTLEMENT. 2.

INJUNCTION—By way of specific performance
See LANDLORD AND TENANT. [147

—— Motion by defendant before filing counterclaim - - - - - 541
See PRACTICE. 3.

INTEREST—Purchase-money - - 524
See VENDOR AND PURCHASER. 1.

JOINT AND SEPARATE ESTATES—Partnership—Bankruptcy - - - 557
See BANKRUPTCY. 2.

JUDGMENT CREDITOR—Lunatic—Maintenance—Priority - - - 519
See LUNATIC. 1.

JURISDICTION—Settled Land Act—Tenant for life—Lunatic not so found 415, 416, n.
See LUNATIC. 2, 3.

—— Stannaries Court—Winding-up - 344
See COMPANY. 11.

LANDLORD AND TENANT—*Telephone—Hiring Agreement—Cutting off Wire—Injunction—Specific Performance—Notice determining Tenancy—Holding over—Acceptance of Rent—Waiver of Notice.*] Under an agreement in 1889 the Defendants, a telephone company, supplied to the Plaintiffs the use of a telephone wire and apparatus for three years at a rent payable quarterly. Upon the expiration of the term the parties continued the agreement by mutual consent. On the 30th of December, 1893, being the last day of a quarter, the Defendants gave the Plaintiffs a notice determining the agreement forthwith, and stating their intention to disconnect the wire and remove the apparatus, and at the same time they demanded rent "up to the 31st of December," being one day beyond the quarter. This rent was duly paid to and accepted by the Defendants. Upon a motion by the Plaintiffs for an injunction to restrain the Defendants from interfering with the wire and apparatus:—*Held*, that the agreement created the relation of landlord and tenant, and therefore that the acceptance by the Defendants of rent for a day beyond that on which the notice determining the contract was given operated as a waiver of the notice. Accordingly, an injunction was granted restraining the Defendants from acting on their notice.—The rule as to granting an injunction by way of specific performance, considered.—*Fothergill* v. *Rowland* (Law Rep. 17 Eq. 132) discussed. KEITH, PROWSE & CO. *v.* NATIONAL TELEPHONE COMPANY - 147

LAPSE—Settled shares - - - 276
See WILL 3.

LEASEHOLD—Assignment for limited purpose—Declaration of trust—Statute of Frauds
See FRAUDS, STATUTE OF. 1. [133

—— Sale by executor—Lapse of twenty years—Title - - - - - 101
See VENDOR AND PURCHASER. 3.

LEGACY—Ademption—Increase—Effect of order in lunacy - - - - 577
See WILL. 1.

LICENSE—Revocation - - - 437
See EASEMENT.

LIQUIDATOR—Additional—Security for costs
See COMPANY. 12. [632

LOCAL GOVERNMENT—*Sewer constructed by Landowner for his own Profit—Vesting in Local Authority—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 13), *sub-s.* 1.] By sect 13 of the Public Health Act, 1875, "all existing and future sewers within the district of a local authority . . . except (1.) sewers made by any person for his own profit . . . shall vest in and be under the control of such local authority":—*Held*, that sewers made by a landowner for the purpose of draining a town, the greater part of which stood on his lands, and for the use of which sewers he levied and was paid a sewer rate by all persons whose houses were connected with his sewers, were sewers made by him "for his own profit" within the meaning of the above exception, and that, consequently, such sewers did not vest in the local authority. MINEHEAD LOCAL BOARD *v.* LUTTRELL - - - - - 178

LOCAL GOVERNMENT BOARD—Consent of—Alienation of corporate property 208
See MUNICIPAL CORPORATION. 2.

LUNATIC—*Judgment Creditor—Execution—Receiver—Maintenance of Lunatic—Maintenance of Wife—Priorities—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *ss.* 116, 117—*Form of Order*] Where the property of a lunatic has become subject to the control of the Court in Lunacy by the appointment of a receiver, it cannot be seized under a writ of fi. fa. by an execution creditor of the lunatic; and the Court will make an order for bringing the lunatic's property into Court, and for payment thereout of costs and of an allowance for the maintenance of the lunatic—though not of his wife also—in priority to any claim of the execution creditor; but, subject to such allowance and to the costs incurred in relation to the lunatic's property, the order will be made without prejudice to any charge or priority which the creditor may have acquired by lodging his writ

LUNATIC—*continued.*

of fi. fa. with the sheriff—Form of order for maintenance of a lunatic where a judgment creditor has obtained execution. *In re* WINKLE [C. A. 519

2. —— *Tenant for Life—Lunatic not so found—Person Lawfully Detained—Person Appointed to Exercise Powers of Committee—Power of Sale under Settled Land Acts — Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *ss.* 116, 120, 128, 341—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 3, 53, 62.] The Court has no jurisdiction under sect. 62 of the Settled Land Act, 1882, to exercise the powers of the Act on behalf of a lunatic tenant for life unless he has been found lunatic by inquisition and a committee has been appointed. *In re* BAGGS [C. A. 416, n.

3. —— *Tenant for Life—Person incapable of Managing his Affairs—Person appointed by Judge to exercise Powers—Power of Sale vested by Settlement in Tenant for Life — Order authorizing Exercise of Power—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *s.* 116, *sub-ss.* 1 (*d*), 2; *ss.* 120, 128] X., the tenant for life in possession of a settled estate, was a person incapable of managing his affairs, within the meaning of sect. 116, sub-sect. 1 (*d*), of the Lunacy Act, 1890; and by an order under the same Act Y. had been authorized to receive the rents of and let and manage the settled estate.—The settlement contained a power enabling each successive tenant for life in possession, with the consent of the trustees, to sell the settled estate. The trustees were willing to consent to a proposed sale of part of the settled estate, and the Master had found that the sale was desirable; but a question was raised as to whether under the provisions of the Lunacy Act, 1890, Y. could be authorized to exercise the power of sale:—*Held*, that under sects. 120 and 128 of the Lunacy Act, 1890, or one of them, the Court had power to authorize Y. to exercise the power of sale vested in X. by the settlement. *In re* X. [C A. 415

MACHINERY—Trade fixtures—Mortgage of premises - - - - 600
See EXECUTOR.

MAINTENANCE—Adult children—Construction of will - - - - 282
See WILL. 2.

—— Lunatic—Lunatic's wife - - 519
See LUNATIC. 1.

MINE—*Railway Company—Old Act—Purchase of Land—Conveyance—Mines and Minerals, Reservation of—Subjacent Mines—Easement—Right of Support—Alteration of old Railway—Increasing burden of Easement—Mine-owner's right to work Mines—Subsidence of Surface—Purchase of Mines—Compensation—Injunction—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 78, 79.] In 1830, under the powers of a special Act of 1825, land was conveyed to a tramway company for the purpose of a horse-tramway authorized by the Act, which reserved to the owner of land conveyed the subjacent mines with power to work them, but not so as to injure the tramway. By a special Act of 1855 the tramway was vested in another company thereby incorporated with power to alter the tramway into a railway of the modern type. That Act incorporated the Railways Clauses Consolidation Act, 1845, and repealed the Act of 1825, but without prejudice to anything done under it, and to all rights and liabilities which, if the repealing Act were not passed, would be incident to or consequent on anything so done. Under that Act of 1855 a line of railway suitable for locomotive engines and carriages was laid down and worked over the land comprised in the conveyance of 1830.—In 1892, the Defendants, the present owners of the subjacent mines, gave the Plaintiffs, the present owners of the railway, notice under sect. 78 of the Railways Clauses Consolidation Act of their intention to work the mines, and, on the Plaintiffs declining to pay compensation, proceeded to work the mines, and in so doing caused subsidences of the surface and railway. Thereupon the Plaintiffs brought an action for an injunction, claiming to be entitled, by virtue of the conveyance of 1830, to an easement or right of support and to be under no liability to purchase the mines under the Railways Clauses Consolidation Act:—*Held*, that the Plaintiffs were entitled under the conveyance, to a right of support from the subjacent mines without payment of compensation; that such right had not been lost by the alteration of the old tramway into a railway; that the Act of 1855 did not operate to alter the express contract entered into in 1830 by the predecessors of the Plaintiffs and Defendants; and that the Plaintiffs were entitled to an injunction. GREAT WESTERN RAILWAY COMPANY *v.* CEFN CRIBBWR BRICK COMPANY - - - 157

—— Stannaries Court—Jurisdiction—Winding-up - - - - - 344
See COMPANY. 11.

MORTGAGE — *Consolidation — Assignment of Equity of Redemption prior to Union of Mortgages.*] B. was the owner of Blackacre and Whiteacre. In February, 1864, he mortgaged Blackacre to S., and in July, 1864, he gave a second mortgage on it to X.—In 1863, 1865, and 1866 he mortgaged Whiteacre to Z. and others.—In 1871 and 1873 the first mortgages were transferred to R.—In 1884 B. mortgaged both properties to M., and in 1885 he mortgaged both properties to P. (in each case subject to the prior incumbrances).—In July, 1890, the second mortgage of X. on Blackacre was transferred to P., who in October, 1890, under the power of sale in such mortgage, sold Blackacre to M., subject only to the mortgage to S.:—*Held*, that, as the union of the first mortgages had not taken place until after the equity of redemption in Blackacre had been assigned to X., the executors of R. could not consolidate the first mortgages so to prevent M. from redeeming Blackacre alone: and that such right of redemption was not affected by M. or P. being a puisne incumbrancer on both properties when the interest of X. vested in either of them. MINTER *v.* CARR - 321

2. —— *Consolidation — Different Properties mortgaged to Distinct Mortgagees—Assignment of Equities of Redemption to one Person—Subsequent Union of Mortgages in one Person.*] B., who was the owner of several properties, in the years 1863-

MORTGAGE—*continued.*

1866, mortgaged them to different mortgagees for distinct sums, and in 1868 gave a second mortgage on all the properties to H.—In 1871 and 1873 all the first mortgages except one were transferred to R.—In 1885 H. transferred the second mortgage to P., and in 1890 the remaining first mortgage was transferred to R.'s executors. In 1893 P. sought to redeem two of the properties on paying only the amounts due under the first mortgages on them:—*Held*, following *Tweedale* v. *Tweedale* (23 Beav. 341) and *Vint* v. *Padget* (2 De G. & J. 611), that R.'s executors were entitled to consolidate all the first mortgages.—*White* v. *Hillacre* (3 Y. & C. Ex. 597), *Jennings* v. *Jordan* (6 App. Cas. 698), and *Harter* v. *Colman* (19 Ch. D. 630), distinguished. PLEDGE *v.* CARR - - - - - - 328

—— Business premises—Trade machinery 600
See EXECUTOR.

—— Jointure rent-charge—Jurisdiction to sell land to raise arrears - - 564
See RENT-CHARGE.

—— Priority—Stop order on funds in Court 449
See PRACTICE. 4.

MORTMAIN - - - - - - 88
See CHARITY.

MUNICIPAL CORPORATION—*Borough Funds—Misapplication—Ultrà vires—Subsidy to a College—Additions to Mayor's Salary—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *ss.* 143, 144—*Cardiff Corporation Act*, 1884 (47 & 48 *Vict. c. cxxii.*), *s.* 32.] The Corporation of Cardiff were empowered by their special Act to contribute £10,000 towards the purchase of a site for a college, and passed a resolution that that sum should be paid on certain property being conveyed to the college authorities. The intended purchase remained in abeyance, and the college was carried on at suitable premises rented for the purpose by the council of the college:—*Held*, that the payment of a sum of £400 out of the borough fund by the corporation to the college, being one year's interest at 4 per cent. on the proposed contribution of £10,000, could not be justified, either under the special Act, or as a payment "for the public benefit of the inhabitants and improvement of the borough" within the meaning of sect. 143 of the Municipal Corporations Act, 1882:—But *held*, that the payment out of the borough fund of a sum of £650, which by a resolution of the corporation was added to the mayor's salary for the year 1893 for the purpose of celebrating the marriage of the Duke and Duchess of York, which in fact was not paid to the mayor, but was carried to a separate account and expended for that purpose under the direction of a marriage committee, was not illegal.—A payment made in form by way of addition to a mayor's salary is not legal unless it is a *bonâ fide* increase of salary. ATTORNEY-GENERAL *v.* CORPORATION OF CARDIFF - - - - - 337

2. —— *Vendor and Purchaser—Restrictive Covenant—Building Scheme—Alienation of Corporate Property—Consent of Treasury or Local Government Board—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *ss.* 108, 109, 236—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 72.] In March, 1888, a municipal corporation offered for sale by auction, in lots, some of their corporate land, subject to special conditions restricting the right of each purchaser to build on his lot. At the auction none of the lots were sold. In June, 1888, the Plaintiff entered into a contract to purchase two of the lots, subject to the conditions. The proper steps were taken to obtain the approval of the Treasury, which is required by sects. 108, 109, of the Municipal Corporations Act, 1882, to enable a municipal corporation to sell their corporate land; and that approval was given in the ordinary way by two Lords of the Treasury joining in the conveyance to the Plaintiff. The conveyance contained a covenant by the Plaintiff in the terms of the restrictive conditions, but there was no reference to those conditions, or to the previous abortive sale. There was no covenant by the corporation binding them by the conditions as regarded the unsold lots, and the Treasury were not, before they gave their approval, informed that the corporation would be liable to any such restriction. The corporation afterwards contracted with the trustees of a church to sell to them two others of the lots, and authorized them to build on those lots in a manner inconsistent with the conditions:—*Held*, by North, J., and by the Court of Appeal, that, if the corporation had been ordinary individuals, they would have been bound by the original building scheme, and that they, and the trustees, who had purchased with notice of the scheme, must have been restrained from building or permitting building on the lots purchased by the trustees, in a manner inconsistent with the conditions:—But *held*, that the Treasury had only given their approval to what was to be found in the conveyance, and that they had not sanctioned the disposition by the corporation in favour of the Plaintiff of any right over other land than that which was conveyed to him, and consequently that neither the corporation nor the trustees could be restrained from violating the conditions. DAVIS *v.* CORPORATION OF LEICESTER - - - - C. A. 208

NIECE—Grandniece—Illegitimacy—Construction of will - - - - 83
See WILL. 4.

NOTICE—To determine tenancy—Waiver 147
See LANDLORD AND TENANT.

NOVATION — Surviving partner — Bankers — Deposit note - - - 236
See PARTNERSHIP. 1.

PARTNERSHIP—*Bankers—Death of Partner—Novation—Liability of deceased Partner's Estate—Transfer from Current Account to Deposit Account.*] A customer of a banking partnership, after the death of one of the partners, removed money from his current account to a deposit account bearing interest at the same bank, and received a deposit note from the surviving partner:—*Held* (affirming the decision of Chitty, J.), that there was sufficient evidence of novation to discharge the estate of the deceased partner from

PARTNERSHIP—*continued.*
liability for the amount placed on deposit.—*In re Head* ([1893] 3 Ch. 426) distinguished. *In re* HEAD. HEAD *v.* HEAD (No. 2) C. A. 236

2. —— *Death of Partner—Business carried on by Surviving Partner—Remuneration for Services—Business carried on at a Loss.*] When after the death of a partner the business is, with the concurrence of his executors, carried on by the surviving partner with a view to the benefit of himself and the estate of the deceased, he is not entitled to remuneration for his services if no profits are derived from the carrying on of the business. *In re* ALDRIDGE. ALDRIDGE *v.* ALDRIDGE - - - - - - - 97

—— Bankruptcy—Joint and separate estate 557
See BANKRUPTCY. 2.

—— Retiring partner—Indemnity—Creditors of old firm—Suretyship—Giving time 32
See PRINCIPAL AND SURETY.

PATENT—"*Threats*"—*Injunction—Inquiry as to Damages—Loss of Contract—Evidence—Admissibility—Measure of Damage—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 32.] In an action under sect. 32 of the Patents, Designs, and Trade Marks Act, 1883, an injunction was granted restraining the Defendant from threatening the Plaintiff with legal proceedings or liability in respect of the manufacture or use of cameras, made pursuant to an invention of the Plaintiff, but alleged by the Defendant to be an infringement of a patent belonging to him. And an inquiry was directed whether the Plaintiff had sustained any, and what, damages by reason of the Defendant's threats. Upon the inquiry the Plaintiff alleged that he had, by reason of the Defendant's threats, lost the benefit of a contract which he was on the point of concluding with a company for the exclusive use by them of his camera, at a specified price for each camera, for a term of three years, the company guaranteeing orders to a minimum amount of £750 per annum during the term:—*Held*, that a letter, written by the company's solicitors to the Plaintiff, stating that the company declined to continue the negotiations for the contract because of the Defendant's threats, was admissible (though not necessarily conclusive) evidence that the negotiations were in fact discontinued because of the Defendant's threats:—*Held*, also, that the proper measure of the damages was the profit which the Plaintiff would have derived from the proposed contract, if it had been carried out. SKINNER & Co. *v.* SHEW & Co. - - - - - 581

PERPETUITY—Trust for sale - - 310
See WILL. 5.

PETITION—Winding-up - - - 349
See COMPANY. 8.

PICTURES—Copyright in—Tableaux vivants 1
See COPYRIGHT.

POWER OF SALE—Lunatic's settled estates [415
See LUNATIC. 3.

PRACTICE—*Appeal—Time for Appeal—Judgment in Action—Rules of Supreme Court*, 1883, *Order LVIII., r.* 15—*Rules of Supreme Court*, 1893, *r.* 27—*Judgment before new Rule came into operation.*] The rule of November, 1893, limiting the time for appealing against judgments to three months, does not apply to a judgment perfected before that rule came into operation. BUDGETT *v.* BUDGETT - - C. A. 555

2. —— *Costs—Enforcing Payment of—Sequestration—Rules of Supreme Court*, 1883, *Order XLII., r.* 6; *Order XLIII., rr.* 6, 7.] Where an order has been made directing a party to pay costs without limiting any time for payment, and the costs have been taxed, an immediate sequestration to enforce payment of them can be issued by leave of a Judge, and it is not necessary that there should be any previous four day order; but an order directing an attachment or sequestration on a future uncertain event, e.g., on default of payment within a specified time, is wrong in form. *In re* LUMLEY. *Ex parte* CATHCART [C. A. 271

3. —— *Motion for Injunction by Defendant—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8—*Rules of Supreme Court*, 1883, *Order L., r.* 6.] A defendant who has not filed a counterclaim cannot apply for an injunction against the plaintiff, unless the relief sought by the injunction is incident to or arises out of the relief sought by the plaintiff. If the defendant desires any other relief before the time arrives for delivery of a counter-claim, he must issue a writ in a cross-action.—*Sargant* v. *Read* (1 Ch. D. 600) and *Porter* v. *Lopes* (7 Ch. D. 358) distinguished. CARTER *v.* FEY - - - C. A. 541

4. —— *Stop Order—Fund in Court—Mortgage by Tenant for Life—Prior Settlement not disclosed by Mortgagor—Stop Order obtained by Mortgagees—Priority.*] In ascertaining the effect of a stop order upon a fund in Court, the Court is not bound to confine its attention merely to the language of the order itself, but may have recourse to what appears from any part of the order.—Having regard to the practice which prevails in the Paymaster-General's Office of treating stop orders on funds in Court as not affecting income except where income is mentioned on the face of such orders, care should be taken in drawing up stop orders to express on the face of them plainly whether capital or income or both are to be restrained.—The mortgagees of the interest of a tenant for life of a fund in Court obtained a stop order, general in terms, upon "the share" of the mortgagor:—*Held*, that the stop order affected the income, and gave the mortgagees priority over the trustees of a prior settlement not disclosed by the mortgagor, who had obtained no stop order upon the fund. MACK *v.* POSTLE - - - 449

5. —— *Third Party Notice—"Person not a Party to Action"—Leave of Court—Premature Application—Rules of Supreme Court*, 1883, *Order XVI., r.* 48.] An action was brought by beneficiaries against the trustees of a will to make them liable for an alleged breach of trust. The trustees claimed indemnity against the estate of a deceased beneficiary whose executors were one of the Plaintiffs, one of the Defendant trustees, and a person who was not a party to the action:—*Held*, that rule 48 of Order XVI. did not apply, and that leave

PRACTICE—*continued.*
ought not to be given to the Defendant trustees to serve a third party notice upon the other two executors of the deceased beneficiary.—*Held*, also, that an application for leave to serve a third party notice made before a defence had been delivered was premature. *In re* GILSON. GILSON *v.* GILSON - - - - - 92
—— Appeal—Companies Arrangement Act 410
See COMPANY. 6.
—— Arbitration—Staying proceedings - 478
See ARBITRATION.
—— Costs—Winding-up - - - 622
See COMPANY. 10.
—— Foreclosure—Mortgage debentures of company - - - - 170
See COMPANY. 1.
—— Originating summons—Claim of possession by equitable tenant for life - 297
See SETTLEMENT. 3.

PRESUMPTION—Highway—Ownership of soil ad medium filum viæ - - 11
See HIGHWAY. 1.

PRINCIPAL AND SURETY—*Partnership Debt—Retiring Partner—Giving Time—Release of Surety—Authority given by Deed of Dissolution to obtain Time—Covenant to indemnify retiring Partner.*] The Plaintiff and three other persons were partners, and jointly and severally liable to a bank for a large overdrawn balance. The Plaintiff retired from the business, which was thenceforth carried on by the other partners. The Plaintiff assigned his share to the other three, and they covenanted to pay all the debts of the firm, and indemnify him against them: provided always, that he should not be entitled to require them to pay any of the debts so long as he was kept indemnified against all claims in respect of them. The bank were aware of the terms of this agreement. The new firm opened a new account with the bank; but the old debt was kept separate, the bank charging the new firm compound interest on it, and allowing them interest on their new account. On the 16th of February, 1889, the balance then due being £50,000, the new firm applied to the bank for an increase of their overdraft to £53,000 till the 14th of March, and this application was granted for valuable consideration. The new firm afterwards executed a deed for the benefit of their creditors under which the bank received a dividend, and then made a claim for the balance of the old debt against the Plaintiff:—*Held*, by Kekewich, J, that notwithstanding *Swire* v. *Redman* (1 Q. B. D. 536), it must be taken to have been decided by *Oakeley* v. *Pasheller* (4 Cl. & F. 207; 10 Bli. (N.S) 548), that if a creditor has two principal debtors, one of whom, by subsequent arrangement between themselves to which the creditor is no party and does not assent, becomes primarily liable for the debt, and such arrangement is notified to the creditor, the one secondarily liable has thenceforth the rights of a surety as against the creditor, and is discharged if time is given to the other debtor; and that as the arrangement of February, 1889, was a giving of time to the new firm, the bank had lost their claim against the Plaintiff:—*Held*, by Lindley and Kay, L JJ. (A. L. Smith, L.J. dissenting), that the view taken by Kekewich, J., of the decision in *Oakeley* v. *Pasheller* (4 Cl. & F. 207; 10 Bli. (N.S.) 548), was correct.—But *held*, by Lindley and A. L. Smith, L.JJ. (Kay, L J., dissenting), that the terms of the dissolution were such as to authorize the new firm to obtain time, if necessary, to pay the old debt; and that the Plaintiff, therefore, was not released by time being given to the new firm. ROUSE *v.* BRADFORD BANKING COMPANY - - - C. A. 32

QUALIFICATION OF DIRECTOR - 392, 403
See COMPANY. 4, 9.

RAILWAY—Mines under - - - 157
See MINE.

RECEIVER—Administration action—Business carried on by executor—Indemnity 600
See EXECUTOR.
—— Debenture-holders' action—Order to borrow money - - - - 205
See COMPANY. 3.
—— Official—Costs—Taxation—Winding up of company - - - - 622
See COMPANY. 10.

REGISTRATION—Shares—Allotment sheets 392
See COMPANY. 4.
—— Trade-mark - - - 26, 115
See TRADE-MARK. 1, 2.

REMOTENESS—Trust for sale - - 310
See WILL. 5.

RENT-CHARGE—*Arrears—Jurisdiction to Sell.*] There is equitable jurisdiction to order a sale or mortgage of land to raise arrears of a jointure rent-charge issuing out of the rents and profits of the land; though there is no express charge on the land; but the exercise of the jurisdiction is discretionary. HAMBRO *v.* HAMBRO - 564

REPEAL OF STATUTE—Effect of—Revival of public rights—Highway - - 616
See HIGHWAY. 2.

RESTRAINT OF TRADE—*Covenant—Breach—Agreement by Vendor of Business not to "carry on or be in anywise interested in" any similar Business — Goodwill — Business carried on by Vendor's Wife trading separately—Separate Estate—Injunction.*] The Defendant, who had been carrying on the business of a grocer under the style of "T. P. Hancock," sold the business to the Plaintiff, and entered into an agreement not to "carry on or be in anywise interested in" any similar business within a specified area. About seven years later the wife of the Defendant, desiring (against his wishes) to start her nephew in business, opened a grocer's shop within the specified area, and carried on business there under the style of "Mrs. T. P Hancock." The business was managed by the nephew, and the Defendant's wife took some part in carrying it on; but the Defendant took no part. The money necessary for starting the business was found by the wife out of her separate estate, and no money whatever was contributed by the Defendant, either towards starting the business or carrying

RESTRAINT OF TRADE—*continued.*

it on, nor did he share in the profits in any way. He, however, introduced his wife to his bankers, where she opened an account in her own name, assisted her in obtaining the lease of the shop in her own name, introduced the nephew to the wholesale merchants who had supplied the old business, and, as his wife was disabled by rheumatism from writing, wrote for her a circular inviting "old friends" to come to the shop. He also handed copies of the circular to some few persons, including a tenant of his own:—*Held*, by the Court of Appeal (Lindley, Kay, and A. L. Smith, L.JJ.), Kay, L.J., dissenting, that there had been no breach of the agreement by the Defendant.—Appeal from Kekewich, J., dismissed, but without costs. SMITH *v.* HANCOCK [C. A. 377

RETAINER—Solicitor—Right of client to dispute *See* SOLICITOR. 2. [290

—— Solicitor—Several clients - - 201 *See* SOLICITOR. 1.

REVOCATION—License—Notice - - 437 *See* EASEMENT.

RULES IN WINDING UP, 1890, 1891 - 622 *See* COMPANY. 10.

RULES OF SUPREME COURT, Order XVI., r. 9 *See* COMPANY. 3. [205

—— —— r. 48 - - - - 92 *See* PRACTICE. 5.

—— Order XX., r. 1 (b) - - - 478 *See* ARBITRATION.

—— Order XLII., r. 6 - - - 271 *See* PRACTICE. 2.

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—— Order LXV., r. 27; sub-rr. 30, 39, 40, 48; Appendix N. Title "Instructions" 622 *See* COMPANY. 10.

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SALE BY COURT—Arrears of rent-charge—Jurisdiction - - - 564 *See* RENT-CHARGE.

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SETTLED LAND ACTS—Tenant for life—Lunatic not so found - - 416, n. *See* LUNATIC. 2.

SETTLEMENT—*Illegitimate Child en Ventre sa Mère.*] A. and B., his aunt by the half-blood, went through the ceremony of marriage; a settlement was afterwards made providing for the children of B. by A.; a month afterwards a child was born of B. by A.:—*Held*, that the child took no benefit under the settlement. *In re* SHAW. ROBINSON *v.* SHAW - - 573

2. —— *Infant Wife—Covenant to settle After-acquired Property—Deed by Wife after attaining Full Age affirming Settlement—Not acknowledged.*]

SETTLEMENT—*continued.*

Where a married woman, after attaining twenty-one, by deed though unacknowledged, affirms a settlement executed by her before her marriage, whilst an infant, such settlement is binding on her. *Barrow* v. *Barrow* (4 K. & J. 409) and *Wilder* v. *Pigott* (22 Ch. D. 263) discussed and followed. *In re* HODSON. WILLIAMS *v.* KNIGHT [421

3. —— *Tenant for Life—Female Tenant for Life—Equitable Interest—Letting into Possession—Title Deeds, Custody of—Practice—Originating Summons — Parties — Trustees — Reversioners — Mortgagees—Appointment of new Trustees—Donee of Power appointing himself.*] An equitable tenant for life of a settled estate is entitled to be let into possession on a proper case being made; but the order on an application for the purpose must contain terms protecting the trustees, especially where the property is subject, as in the case of leaseholds, to onerous covenants. The application may be made by originating summons, which must be served upon the trustees, and upon the mortgagees, if any, of the interest of the tenant for life, though not, under ordinary circumstances, upon the reversioner. But, where the tenant for life has mortgaged his interest, the order letting him into possession does not carry with it the right to the custody of the title deeds: these the mortgagee can insist on being retained by the trustees. A female equitable tenant for life is not necessarily disqualified from being let into possession. *In re Peake's Settled Estates* ([1893] 3 Ch. 430) considered. The donee of a power of appointing new trustees cannot appoint himself either solely or jointly with other trustees. *In re Skeats' Settlement* (42 Ch. D. 522) followed. *In re* NEWEN. NEWEN *v.* BARNES - - - - 297

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SIMILARITY—Trade-mark - - 26 *See* TRADE-MARK. 2.

SOLICITOR — *Costs — Taxation — Separate Retainers.*] Where several persons give separate retainers to a solicitor to take proceedings on behalf of all, the strict right of each of them is to have the solicitor's bill taxed without serving any person other than the solicitor; but in order to prevent multiplicity of taxations, the Court will so far as possible direct a single taxation in the presence of all parties interested.—Where thirty-five persons had separately retained a solicitor to take proceedings on their behalf, and fifteen of them applied for taxation of his bill, Kekewich, J., ordered taxation, but directed the order not to be drawn up without proof that the others had been communicated with, and either declined to take part in the proceedings or were made respondents. Some of the parties could

SOLICITOR—*continued.*

not be found, and Kekewich, J., thereupon dismissed the application:—*Held*, on appeal, that Kekewich, J., was right in taking steps to have a taxation in the presence of all parties, but was wrong in dismissing the application when it was found impracticable to serve all the parties, and that taxation must be ordered. *In re* SALAMAN [C. A. 201

2. —— *Costs—Taxation—Right of Client to Dispute Retainer.*] A solicitor having delivered ten bills of costs to a client, the client obtained an order to tax the ten bills, the order containing no reservation of a right to dispute the solicitor's retainer:—*Held*, that it was not open to the client to dispute the retainer of the solicitor as to one of the bills in toto, though he could dispute the retainer as to particular items in any of the bills. *In re* FRAPE. *Ex parte* PERRETT (No. 2) - 290

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45 & 46 Vict. c. 38, ss. 53, 62—*Settled Land Act* - - - - - - 416, n.
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51 & 52 Vict. c. 41, s. 72—*Local Government*
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TRADE-MARK—*Registration—Disclaimer—"Own Name"—Distinctive Label—Essential Particulars—Added Matter—Patents, Designs, and Trade Marks Acts*, 1883-88 (46 & 47 *Vict. c.* 57; 51 & 52 *Vict. c.* 50), *s.* 64.] The proviso in sect. 64, sub-sect. 3 (i) of the Patents, Designs, and Trade Marks Acts, 1883-88, that "a person need not under this section disclaim his own name" is applicable in the case of a firm applying to register a trade-mark on which the firm-name appears, and whether the applicant is an individual or a firm, the name need not be disclaimed, under s. 64, sub-sect. 2, whether the name appearing on the trade-mark is the whole name of the individual or firm, or not, so long as it is used fairly and bonâ fide as representing the name of the owner of the trade-mark:—*Semble*, that the same rule applies whether the name used is the actual name of the applicant, or a name assumed for trading purposes.—The firm of J. & J. Colman, consisting of five persons named Colman, applied to register a label for mustard on which appeared the words, "Colman's Mustard":—*Held*, that the applicants need not disclaim the name "Colman."—*Alexander Pirie & Sons* v. *Goodall* ([1892] 1 Ch. 35) explained.—Whether any disclaimer can be required under sect. 64, sub-sect. 2, of words appearing on a label which is as a whole a distinctive label, and therefore an essential particular, within sect. 64. sub-sect. 1 (c), *Quære*. *In re* COLMAN'S TRADE-MARK APPLICATION - - - - 115

2. —— *Registration—Rectification—Mark resembling another already on Register—Colour—"Calculated to Deceive"—"Person Aggrieved"—Expunging—User—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 67, 72 *sub-s.* 2, 90—*Patents, Designs, and Trade Marks Act*, 1888 (51 & 52 *Vict. c.* 50), *ss.* 10, 14.] Where one trader has registered a device, another trader cannot register a description in words of that device, even though he adds a specific colour.—B & Co. carried on business in London, as dealers in window-glass, which they purchased in Belgium and shipped to Australia and other colonies. In 1876 they registered as a trade-mark the device of a star, which they had used in connection with their glass since 1875; and their glass was known in the trade by the designation of "Star," or "Star Brand."—In 1885 a Belgian glass company registered in Belgium, as a trade-mark for glass, the device of a red star, which they had used there since 1880 In 1890 they registered in England, as a trade-mark for window-glass, the words "Red Star Brand," without any device. They sent large quantities of glass to England in cases marked with a red star, but did not deal directly with the colonies. B. & Co, having discovered that glass was being

TRADE-MARK—*continued.*

sold in New Zealand under the description of "Red Star Brand," moved to expunge the Belgian company's mark from the register:—*Held* (affirming Stirling, J.), that, the Belgian company's mark must be expunged on the ground that it so nearly resembled B. & Co.'s mark as to be calculated to deceive. *In re* THE TRADE-MARK OF LA SOCIÉTÉ ANONYME DES VERRERIES DE L'ETOILE - - - - C. A. 26

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TRAMWAY COMPANY—*Debenture-holders' Action—Order for Sale of Undertaking of Company—Tramways Act*, 1870 (33 & 34 *Vict. c.* 78), *s.* 44.] A tramway company was incorporated by a special Act, with which sect. 44 of the Tramways Act, 1870, was incorporated. In an action by debenture-holders of the company to enforce their security, which comprised the undertaking of the company and all the tolls and sums of money arising therefrom:—*Held*, that the Court had jurisdiction to order the undertaking and tramway of the company to be sold as a going concern, subject to the consent of the Board of Trade. BARTLETT *v.* WEST METROPOLITAN TRAMWAYS COMPANY - - - - 286

TRUST—Declaration of—Statute of Frauds—Assignment of leasehold for limited purpose - - - - 133
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VENDOR AND PURCHASER—*Conditions of Sale—Purchase—Contract—Completion—"Any cause whatever"—"Wilful default" of Vendor—Honest Mistake—Delay—Defective Abstract—Purchaser not having Purchase-money ready—Interest on Purchase-money.*] On a sale of real estate by auction one of the conditions, after fixing the 24th of June, 1892, for completion of the purchase, provided that, "if from any cause whatever, other than wilful default on the part of the vendors," the purchase-money should not then be paid, it should bear interest at 5 per cent. Another condition purported to describe the statutory title under which the vendors, who were a corporation and had been in possession for a long period, were selling. Upon subsequent investigation it appeared that through having omitted to examine their alleged statutory title,

VENDOR AND PURCHASER—*continued.*

the vendors had misdescribed it in the condition, an important part of the property being held under an entirely different statutory title, and eventually the title to the whole was not finally accepted by the purchaser until the 29th of September; but the purchaser did not in fact complete until some months afterwards, having been unable previously to find his purchase-money. He paid interest from the 29th of September until completion, but contended that he was not liable for interest from the 24th of June to the 29th of September, on the ground that the delay in making a good title had arisen from the "wilful default" of the vendors in having omitted to verify their title by proper investigation before making the positive statement in the conditions:—*Held*, by the Court of Appeal (Lindley, Lopes, and Kay, L.JJ.), Kay, L.J., dissenting, that there had been no "wilful default" on the part of the vendors within the meaning of the condition; but, *held*, by the whole Court, upon the facts, that, even assuming there had been such "wilful default," the non-completion on the 24th of June was really attributable to the purchaser's voluntary delay in making requisitions and examining into the title, and to his inability to find his purchase-money, and that he was therefore liable to interest from that date.—What is "wilful default" discussed.—Chitty, J., affirmed. *In re* MAYOR OF LONDON AND TUBBS' CONTRACT - - - - C. A. 524

2. —— *Contract by Letters — Reference to Formal Contract — Specific Performance.*] In reply to a written offer by A. to purchase B.'s property for £1450, B.'s solicitors wrote accepting the offer, and continued, "We enclose contract for your signature. On receipt of this signed by you across the stamp and deposit we will send you copy signed by him." The enclosure was a contract with usual conditions of sale providing for a deposit of 10 per cent., fixing a date for completion, and limiting the period of B.'s title. Three days afterwards B.'s solicitors again wrote A., "Kindly let us know whether we shall send abstract of title to you or to a solicitor for you. At the same time perhaps you will send us deposit. In order to define time for delivery of abstract and for completion, the contract sent you had better perhaps be signed, though the correspondence is a sufficient contract." A. returned the enclosure unsigned:—*Held*, that the letters did not constitute a contract.—*Crossley* v. *Maycock* (Law Rep. 18 Eq. 180) followed.—*Gibbins* v. *Board of Management of North Eastern Metropolitan Asylum District* (11 Beav. 1) distinguished. JONES *v.* DANIEL - - - - 332

3. —— *Title—Sale of Leaseholds by Executor —Lapse of Twenty Years since Death of Testator—Executor's Power to Sell.*] *In re Whistler* (35 Ch. D. 561) must be treated as an express decision that the twenty years' rule laid down in *In re Tanqueray-Willaume and Landau* (20 Ch. D. 465) does not apply to the case of an executor selling leaseholds of his testator.—A contract for sale of renewable leaseholds provided that the title should commence with a lease to T., dated in 1852, for the unexpired residue of the term thereby granted, and that the purchasers should

VENDOR AND PURCHASER—*continued.*

not require an abstract of an earlier title, nor make any objection or requisition in connection therewith. The abstract disclosed that the lease was granted, in consideration (*inter alia*) of a surrendered term, to T., as executor of P., as to the date of whose death nothing was shewn. The next abstracted deed was an indenture, dated in 1878, whereby T. assigned the lease to the vendor, and entered into the usual covenants for title of a beneficial owner, no mention being made of his being an executor.—The purchaser required evidence that the sale by T. in 1878 was valid:—*Held*, that, in the absence of anything to shew the contrary, T. must be presumed to have acted in the discharge of his duties as executor; and that neither the circumstance that the deed of 1878 did not purport to be executed by him as executor, nor the lapse of time, were sufficient to raise the presumption that he was acting otherwise:—*Held*, therefore, that the abstract shewed a good title, and that the purchasers could not insist upon their requisition.—*In re Whistler* followed.—*In re Molyneux & White* (13 L. R. Ir. 382; 15 L. R. Ir. 385) explained. *In re* VENN & FURZE'S CONTRACT - - - C. A. 101

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WILL—*Ademption of Legacy—Order in Lunacy.*] The transfer, under an Order in Lunacy, of 2¾ per cent. Consols into the name of the Paymaster-General out of the name of a testatrix who had become of unsound mind:—*Held*, not to adeem a bequest by the testatrix of all 2¾ per cent. Consols "standing in my name and belonging to me at the time of my decease."—The investment, under the same order, of money of the testatrix in like Consols in the name of the Paymaster-General, *held*, not to increase the legacy.—Part of the Consols in Court were subsequently sold, under the same order, to raise costs. The Court now directed that the sale should be taken in reduction, not of the amount transferred, but of the amount invested so as to preserve the rights of the legatees. *In re* WOOD. ANDERSON *v.* LONDON CITY MISSION - - - 577

2. —— *Gift to Wife for life, "for her use and benefit and for the maintenance and education of my children"—Right of Adult Children to Maintenance during Life of Widow.*] A testator gave the residue of his estate to his executors, on trust to pay to his wife or permit her to receive the

WILL—*continued*

annual income thereof during her life, "for her use and benefit and for the maintenance and education of my children," and after her decease upon trust to divide his residuary estate equally between all his children living at his decease:—*Held*, that the wife took the income subject to a trust for the maintenance and education of the children, and that the trust was not limited to children under twenty-one or unmarried.—All the children having attained twenty-one, one of the daughters having married, and the widow having become bankrupt, two unmarried daughters, who were living with their mother, issued a summons asking the Court to determine whether they were entitled to be maintained out of the income of the residue during the remainder of their mother's life. A similar summons had been issued by the married daughter.—The Court directed an inquiry whether any, and, if any, which of the children required maintenance. *In re* BOOTH. BOOTH *v.* BOOTH - - 282

3. —— *Lapse—Settlement of Shares—Death of Legatee in Testator's Lifetime.*] A testator directed his trustees to stand possessed of his residuary estate in trust for his four sisters (by name) in equal shares, "Provided always and I declare that my trustees shall retain the share of each of my sisters of and in the residuary trust funds upon the trusts following," which were, to pay the income thereof to such sister for life, with power to appoint a life interest to a husband, and after her death for her children at twenty-one or marriage, and in default of children who should attain a vested interest, for such persons as should be next of kin to her at her decease. One of the sisters having predeceased the testator, leaving infant children:—*Held*, that the share of the deceased sister had not lapsed, and that the infants were entitled to it contingently on their attaining twenty-one or marriage.—*Stewart* v. *Jones* (3 De G. & J. 532) and *In re Roberts* (30 Ch. D. 234) distinguished. *In re* PINHORNE. MORETON *v.* HUGHES - 276

4. —— *Niece—Grandniece of Wife—Illegitimacy—Extrinsic Evidence.*] A testator gave his residuary estate to his "niece E. W." Neither he nor his wife had any niece; but his wife had a legitimate grandniece and an illegitimate grandniece both named E W The illegitimate grandniece tendered evidence to show that she was the person indicated by the testator:—*Held* (affirming the decision of the Vice-Chancellor of the Palatine Court of Lancaster), that the illegitimate grandniece could not come into competition with the legitimate grandniece, and therefore there was no latent ambiguity and no extrinsic evidence could be admitted. *In re* FISH. INGHAM *v.* RAYNER - - - - C. A. 83

5. —— *Remoteness—Perpetuity—Devise of Gravel-pits—Trust to work out and then sell—Proceeds of Sale—Gift to unascertained Class.*] A testator directed his trustees to carry on his business of a gravel contractor until his freehold gravel-pits were worked out, and then to sell them; and he directed his trustees to hold the proceeds of sale in trust for such children of his "then living," and such issue living of any children then deceased, as should, being sons, attain twenty-one, or, being daughters, attain that age or marry, in equal shares per stirpes; and it was his wish that, until such sale, his sons should continue to be employed in the business.—The testator left several children. At his death the greater part of his gravel-pits had been worked out, and the remainder was worked out by his trustees in six years from his death:—*Held*, that both the direction to sell and the trusts of the proceeds were void for remoteness.—*In re Daveron* ([1893] 3 Ch. 421) and *Goodier* v. *Edmunds* ([1893] 3 Ch. 455) considered. *In re* WOOD. TULLETT *v.* COLVILLE - - 310

6. —— *Shifting Clause—"Possession or receipt of Rents and Profits"—Management by Trustees.*] A testatrix devised a freehold dwelling-house and land to the sons of her niece successively for life, with remainder to their respective sons successively in tail, with a proviso that during such time as any person who (if that proviso had not been inserted) would for the time being be entitled to the possession, receipt, or enjoyment of the rents and profits of the hereditaments as tenant for life or tenant in tail by purchase, should be under the age of twenty-one years, the trustees of the will should enter into the possession or receipt of the rents and profits of the hereditaments, and manage the same and pay the expenses of management and other outgoings, and should pay such sums as they should think fit towards the maintenance and education of such minor and should apply the residue of such rents and profits upon the trusts declared of the residuary personal estate. Then followed a proviso that if any person for the time being entitled to the possession or to the receipt of the rents and profits of the said hereditaments should succeed to the title of Earl of R., then the hereditaments should go and remain to the uses and for the trusts to and upon which the same premises would have stood limited and settled under the will, if the person who should so succeed to the title were dead without issue. The Defendant became tenant in tail by purchase under the limitations of the will, being under the age of twenty-one years; and a few years afterwards, being still an infant, he succeeded to the title of Earl of R.:—*Held* (affirming the decision of Kekewich, J.), that having regard to the proviso for the possession and management of the estate by the trustees during minorities, and to the use of the words "possession or receipt of the rents and profits" in other parts of the will, the Defendant, on succeeding to the title of Earl of R., was not in possession or in receipt of the rents and profits of the premises, and therefore the shifting clause did not take effect. LESLIE *v.* EARL OF ROTHES [C. A. 499

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